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917
No. 2471

United States
Circuit Court of Appeals
For the Ninth Circuit

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record

**Upon Writ of Error to the United States District Court
for the Eastern District of Washington,
Northern Division.**

Filed

SEP 1 - 1914

F. D. Monckton,
Clerk.

No. _____

United States
Circuit Court of Appeals
For the Ninth Circuit

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Names and Addresses of Attorneys of Record

ARTHUR C. SPENCER, Wells Fargo Building, Portland, Oregon, and

HAMBLEN & GILBERT, Paulsen Building, Spokane, Washington,

Attorneys for Plaintiff in Error.

FRANCIS A. GARRECHT, U. S. Attorney, Federal Building, Spokane, Washington, and

OTIS B. KENT, Special Assistant United States Attorney, Washington, D. C.,

Attorneys for Defendant in Error.

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1752.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Complaint

Now comes the United States of America, by Oscar Cain, United States Attorney for the Eastern District of Washington, and brings this action on behalf of the United States against the Oregon-Washington Railroad & Navigation Company, a corporation organized and doing business under the laws of the State of Oregon, and having an office and place of business at Colfax, in the State of

Washington; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

FOR A FIRST CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington, and that the railroad of said defendant runs through the judicial district established by law as the eastern district of Washington.

Plaintiff further alleges that in violation of a certain order of the Interstate Commerce Commission issued on June 28, 1911, and made in pursuance of the provisions and requirements of Section 20 of the Act of Congress known as "An Act to Regulate Commerce," approved February 4, 1887 (24 Statutes at Large, 379), as amended by an Act approved June 29, 1906 (34 Statutes at Large, 584), as amended by an Act approved February 25, 1909 (35 Statutes at Large, 648), and as amended by an Act approved June 18, 1910 (36 Statutes at Large, 556), which order of said Commission is in the words and figures following, to-wit:

"IT IS ORDERED, That all carriers subject to the provisions of the Act entitled "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, report within 30 days after the end of each month, under oath, all instances where employees subject to said Act have

been on duty for a longer period than that provided in said Act,"

defendant, having theretofore failed to make and file with said Commission in any form whatsoever a report of all the instances wherein its employees subject to said "Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, were on duty during the month of March, 1913, for a longer period than that provided in said Act, did, on the 1st day of May, 1913, continue to be in default with respect thereto, and did fail to make and file with said Commission any report of the following instances in which employees of said railroad within the scope of said Act, were required or permitted to be and remain on duty as such employees for said railroad in certain twenty-four hour periods during said month of March, 1913, for a longer period of service than that provided in said Act, to-wit:

That wherein its certain operator and employee, B. G. Bishop, during the 24 hour period beginning at the hour of 7:30 A. M., on March 27, 1913, at its office and station at Colfax, in the State of Washington, was permitted and required to be and remain on duty for a longer period than thirteen hours, in said twenty-four hour period, to-wit: from the said hour of 7:30 A. M., on said date, to the hour of 8:45 P. M., on said date, and from the hour of 9:30 P. M., on said date to the hour of 11:15 P. M., on said date; said office and station then being one

operated only during the day time, and said employee while so required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, having dispatched, reported, transmitted, received and delivered orders affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of said violation of said order of the Interstate Commerce Commission, defendant is liable to the plaintiff in the sum of one hundred dollars.

"Said complaint contained 29 additional causes of action of the same tenor and effect, and in precisely the same words and figures as the first cause of action; except that the dates wherein defendant was alleged to have continued in default with respect to said reports were alleged to be respectively from the 2nd day of May, 1913, to the 17th day of May, 1913, both dates inclusive and intervening Sundays excepted, and from the first day of July, 1913, to the 18th day of July, 1913, both dates inclusive and Fourth of July and intervening Sundays excepted.

WHEREFORE, plaintiff prays judgment against defendant in the sum of \$3000.00 and its costs herein expended."

(Signed) OSCAR CAIN,
United States Attorney.

Endorsements: Complaint.

Filed in the U. S. District Court for the Eastern District of Washington, August 4, 1913.

W. H. HARE, Clerk,
By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1752.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant.

Answer

Comes now the above named defendant, Oregon-Washington Railroad & Navigation Company, a corporation, and makes answer to the complaint of the plaintiff herein as follows:

I.

It denies each and every allegation contained in each of the thirty causes of action stated therein, except that it admits that during the time mentioned in each of said causes of action it was a common carrier engaged in Interstate Commerce by railroad in the state of Washington, and that its railroad runs through the Judicial District of the Eastern District of Washington; and except as to each of said causes of action the defendant admits that it did not, for the times mentioned in said causes of action nor prior thereto, report to the Interstate Commerce Commission the instances designated in said several causes of action as first to thirtieth inclusive in which the employee mentioned in said several causes of action was permitted to remain on duty for said

defendant railroad company in the 24-hour period mentioned in said several causes of action for a longer period than thirteen hours.

WHEREFORE defendant prays that the plaintiff's complaint be dismissed, and that it have and recover its costs and disbursements herein.

(Signed) A. C. SPENCER,

(Signed) HAMBLIN & GILBERT,

Attorneys for Defendant.

STATE OF WASHINGTON,

County of Spokane,—ss.

W. S. GILBERT, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the above named defendant and makes this verification for and on its behalf for the reason that none of the officers of said defendant corporation are present within the county of Spokane capable of making this verification. That he has read the foregoing answer, knows the contents thereof, and the same is true as he verily believes.

(Signed) W. S. GILBERT.

Subscribed and sworn to before me this 4th day of September, 1913.

(Signed) L. R. HAMBLIN,

Notary Public in and for the State of Washington, Residing at Spokane, Washington.

Endorsements: Copy of within answer received this 5th day of September, 1913.

(Signed) OSCAR CAIN,

United States Attorney.

Answer.

Filed in the U. S. District Court for the Eastern District of Washington, September 5, 1913.

W. H. HARE, Clerk,
By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1752.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant.

Stipulation

It is hereby STIPULATED by and between the parties to the above numbered and entitled cause that the defendant, Oregon-Washington Railroad & Navigation Company, is, and was during all the times specified in the declaration, a common carrier by railroad incorporated, organized, existing and doing business under the laws of the State of Oregon, and that it is, and was during all of said time, engaged in interstate commerce.

That on March 27, 1913, a certain telegraph operator and employee in the service of the said defendant, to-wit: B. G. Bishop, went on duty at Colfax, in the state of Washington, at 7:30 a. m., and remained on duty as such operator until 11:15 p. m., on said date;

That on May 23, 1913, the said B. G. Bishop went on duty as such operator at Colfax, in the said state of Washington, at 6:30 a. m., and remained on duty as such operator until 8:05 p. m., on said date;

That on both of said dates, between the hours specified, the said operator, B. G. Bishop, was engaged in part in the handling of orders pertaining to or affecting the movement of trains engaged in interstate commerce;

That on September 2, 1913, and not before said date, the said defendant reported to the Interstate Commerce Commission, at its office in Washington, D. C., the two foregoing instances in which an operator and employee of the said defendant remained on duty as such operator for more than 13 hours in a 24-hour period in a place or office operated only during the day time;

That the declaration herein may be amended by interlineation with respect to counts Nos. 16 to 30, inclusive, so as to show the service of the said operator, B. G. Bishop, as having occurred on May 23, 1913, instead of May 25, 1913, as stated in said declaration.

(Signed) FRANCIS A. GARRECHT,
United States Attorney.

(Signed) OTIS B. KENT,
Special Assistant U. S. Attorney.
Attorneys for Plaintiff.

(Signed) A. C. SPENCER and
HAMBLEN & GILBERT,
Attorneys for Defendant.

Endorsements: Stipulation.

Filed in the U. S. District Court for the Eastern
District of Washington, April 20, 1914.

W. H. HARE, Clerk,
By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1752.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant.

Stipulation Waiving Jury

It is hereby stipulated and agreed between the
above named parties that the above-entitled cause
may be submitted to the court, and the trial of said
cause by jury is hereby expressly waived.

(Signed) A. C. SPENCER and

HAMBLEN & GILBERT,

Attorneys for Defendant.

(Signed) FRANCIS A. GARRECHT and

OTIS B. KENT,

Attorneys for Plaintiff.

Endorsements: Stipulation Waiving Jury.

Filed in the U. S. District Court for the Eastern
District of Washington, April 20, 1914.

W. H. HARE, Clerk,
By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1752.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a corporation,

Defendant.

Opinion

Francis A. Garrecht, U. S. Atty., and Otis B. Kent,
Special Asst. to U. S. Atty., for plaintiff.

Hamblen & Gilbert, for defendant.

RUDKIN, District Judge.

On the 28th day of June, 1911, the Interstate Commerce Commission promulgated the following order, pursuant to the authority conferred by Section 20 of the Act of February 4, 1887, (24 Stat., 279), commonly known as, "An Act to Regulate Commerce," as amended by the Act of June 29, 1906, (34 Stat., 584), as amended by the Act of February 25, 1909, (35 Stat., 648), and as amended by the Act of June 18, 1910, (36 Stat., 556):

"IN THE MATTER OF THE METHOD AND FORM OF MONTHLY REPORTS OF HOURS OF SERVICE OF EMPLOYEES ON RAILROADS SUBJECT TO THE ACT OF MARCH 4, 1907:

"The method and form of monthly reports of hours of service of employees upon railroads subject to the Act of March 4, 1907, having been considered by the Commission:

"It is ordered, that all carriers subject to the provisions of the act entitled, 'An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon,' approved March 4, 1907, report within thirty days of the end of each month, under oath, all instances where employees subject to said Act have been on duty for a longer period than that provided in said Act.

"It is further ordered, that the accompanying forms entitled, 'Interstate Commerce Commission, Hours of Service Report,' and the method embodied in the instructions therein set forth, be, and the same are hereby, adopted and prescribed; and all common carriers subject to said acts are hereby notified to use and follow the said prescribed forms and method in making monthly reports of hours of service of employees on duty for a longer period than that named in said act, commencing with and making the first report for the month of July, 1911.

"And it is further ordered, that copies of said forms, together with a copy of this order, be forthwith served upon all common carriers subject to this act."

On the 6th day of July, 1911, a copy of this order was served on Charles H. Bates, who had theretofore been designated as agent in the City of Washington, District of Columbia, for the defendant company upon whom service of all notices and processes might be made for and on behalf of the company, as provided in Section 6 of the Act of

June 18, 1910, to create a commerce court (36 Stat., 544). That section so far as deemed material reads as follows:

“It shall be the duty of every common carrier subject to the provisions of this act, within sixty days after the taking effect of this act, to designate in writing an agent in the city of Washington, District of Columbia, upon whom service of all notices and processes may be made for or on behalf of said common carrier in any proceeding or suit pending before the Interstate Commerce Commission or before said commerce court, and to file such designation in the office of the secretary of the Interstate Commerce Commission, which designation may from time to time be changed by a like writing similarly filed; and thereupon service of all notices and processes may be made upon such common carrier by leaving a copy thereof with such designated agent at his office or usual place of residence in the city of Washington, with like effect as if made personally upon such common carrier, and in default of such designation of such agent, service of any notice or other processes in any proceeding before said Interstate Commerce Commission or commerce court may be made by posting such notice or processes in the office of the Secretary of the Interstate Commerce Commission.”

No copy of the forms was served with the order, or otherwise formally served upon the defendant, so far as the record discloses. It does appear, however, that the defendant company received the forms prescribed by the Interstate Commerce Commission, and

referred to in the order from the Commission, and that report of excessive hours of service was made to the Commission on such forms covering the months for which a default is charged in this case.

The complaint now before the court contains thirty counts or causes of action in all. The first fifteen are based on a failure on the part of the defendant to make report on the first day of May, 1913, to the 17th day of May, 1913, both inclusive, Sundays excepted, of excessive hours of service by an employee named Bishop at Colfax, Washington. The remaining fifteen are based on a like failure to report from the first day of July, 1913, to the 18th day of July, 1913, inclusive, Sundays and the Fourth of July, excluded, of excessive hours of service by the same employee at the same place. It was admitted at the trial that the defendant was a common carrier by railroad engaged in interstate commerce and that the employee in question was on duty for a longer period than that allowed or permitted by law on the several dates named, and that no report was made to the Commission. The sole defense interposed was that a copy of the forms was not served upon the company together with the order as required by law and the order of the Commission. This defense is highly technical and in my opinion should not prevail. The notices and processes referred to in the act creating the Commerce Court are notices and processes of a jurisdictional nature in suits or proceedings inter partes pending before the Commission or the Commerce Court and the provision as to

service of such notices and processes has no application to general administrative orders affecting all carriers such as the one now under consideration. The requirement of service of this order rests entirely on the terms of the order itself and the service was intended for no other purpose than to impart notice to the carriers affected by it. The order as served referred to the forms to be used, the carrier actually received the forms and made reports on them for the very months during which the delinquencies complained of occurred, but the name and excessive hours of service of the employee in question were omitted therefrom by inadvertence or mistake. The company had therefore full notice of the order and its requirements and had full opportunity to comply with its provisions and the most formal notice could accomplish nothing beyond this. For these reasons the defendant in my opinion has incurred the penalty of one hundred dollars for failure to report on each of the several dates mentioned in the complaint and judgment will be entered accordingly.

Endorsements: Opinion.

Filed in the U. S. District Court for the Eastern District of Washington, April 28, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1752.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Judgment

The above-entitled case coming on for trial on this 20th day of April, 1914, the plaintiff appearing by Francis A. Garrecht, United States Attorney for the Eastern District of Washington, and Otis B. Kent, Special Assistant United States Attorney, and the defendant appearing by Hamblen & Gilbert, its attorneys, and trial by jury having been waived by the parties hereto the case was submitted to the court upon oral argument, and the court having filed its opinion finding the defendant guilty as charged in each count of the complaint on file herein, it is, therefore,

ORDERED and ADJUDGED that the defendant, Oregon-Washington Railroad & Navigation Company, be, and it is hereby fined in the sum of Three Thousand Dollars (\$3000.00), being One Hundred Dollars (\$100.00) for each cause of action set forth in the complaint; and it is further,

ORDERED and ADJUDGED that the plaintiff, United States of America, do have and recover of and from the said defendant its costs and disburse-

ments herein incurred, taxed by the clerk in the sum of \$114.83.

Done in open Court this 27th day of May, 1914.

(Signed) FRANK H. RUDKIN, Judge.

Endorsements: Judgment.

Filed in the U. S. District Court for the Eastern District of Washington, May 27, 1914.

W. H. HARE, Clerk,
By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1752.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant.

**Stipulation for Serving and Filing Proposed Bill
of Exceptions**

It is hereby STIPULATED, and agreed, by and between the above named parties, that the above named defendant may have until June 10th, 1914, within which to serve and file its proposed Bill of Exceptions herein.

Dated at Spokane, Washington, this 7th day of May, 1914.

(Signed) FRANCIS A. GARRECHT,

Attorney for Plaintiff.

(Signed) HAMBLÉN & GILBERT,

Attorneys for Defendant.

Endorsements: Stipulation Extending Time for Preparing Proposed Bill of Exceptions.

Filed in the U. S. District Court for the Eastern District of Washington, May 7, 1914.

W. H. HARE, Clerk,
By Frank C. Nash, Deputy.

(COPY)

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 1752.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a corporation,
Defendant.

AT LAW.

Bill of Exceptions

BE IT REMEMBERED, that on the 20th day of April, 1914, at Spokane, Washington, the above entitled action came regularly on for trial before the Honorable Frank H. Rudkin; plaintiff appearing by Francis A. Garrecht, United States Attorney, and Otis B. Kent, Special Assistant to the United States Attorney, and the defendant appearing by Hamblen & Gilbert, its attorneys; a jury having been waived, said cause was tried to the court, whereupon the following proceedings were had.

The plaintiff submitted a certain stipulation between the parties hereto, agreeing upon certain facts

herein, which stipulation is one file, and is as follows:

“IT IS HEREBY STIPULATED by and between the parties to the above numbered and entitled cause that the defendant, Oregon-Washington Railroad & Navigation Company, is, and was during all the time specified in the declaration, a common carrier by railroad incorporated, organized, existing and doing business under the laws of the State of Oregon; and that it is, and was during all of said time, engaged in interstate commerce;

That on March 27th, 1913, a certain telegraph operator and employee in the service of the said defendant, to-wit: B. G. Bishop, went on duty at Colfax, in the State of Washington, at 7:30 a. m., and remained on duty as such operator until 11:15 p. m., on said date;

That on May 23rd, 1913, the said B. G. Bishop went on duty as such operator at Colfax, in the said State of Washington, at 6:30 a. m., and remained on duty as such operator until 8:05 p. m. on said date:

That on both of said dates, between the hours specified, the said operator, B. G. Bishop, was engaged in part in the handling of orders pertaining to or affecting the movement of trains engaged in interstate commerce;

That on September 2, 1913, and not before said date, the said defendant reported to the Interstate Commerce Commission, at its offices in Washington, D. C., the two foregoing instances in which an operator and employee of the said defendant remained on duty as such operator for more than 13 hours

in a 24-hour period in a place or office operated only during the day-time;

That the declaration herein may be amended by interlineation with respect to counts Nos. 16 to 30, inclusive, so as to show the service of the said operator B. G. Bishop, as having occurred on May 23, 1913, instead of May 25, 1913, as stated in said declaration.

For Plaintiff: Francis A. Garrecht, U. S. Attorney.

By: Otis B. Kent, Special Assistant United States Attorney.

For Defendant: Hamblen & Gilbert, attorneys.

The plaintiff offered in evidence, certified copies of Hours of Service reports of the defendant company, reporting hours of excess service of certain employees of said defendant, occurring during the months of March and May, 1913, it being conceded by the defendant that said reports filed with the Interstate Commerce Commission by the defendant, herein, were identical forms of reports required to be used and filed by carriers under the order of the Interstate Commerce Commission on June 28th, 1911.

Defendant objected to the introduction of said certified copies of said reports in evidence, on the ground that same were incompetent, irrelevant, and immaterial. The Court overruled the objection, whereupon the defendant excepted, and said exception was allowed.

TESTIMONY OF CHARLES H. BATES FOR DEFENDANT.

The defendant thereupon introduced in evidence,

the deposition of Charles H. Bates, taken at Washington, D. C., on behalf of the defendant. Said deposition is as follows:

“Examination by Mr. Harr:

CHARLES H. BATES, of lawful age, being by me first duly sworn, as hereinafter certified, deposes as follows:

Q. 1. Mr. Bates, will you please state your residence and occupation?

A. Washington, D. C.; attorney at law.

Q. 2. What connection or employment, if any, have you with the Oregon-Washington Railroad & Navigation Company, defendant in this case?

A. I am the attorney in this city for said Company.

Q. 3. How long have you been so employed?

A. From the time of the organization of said Company, and I represented its predecessor companies back since about 1901.

Q. 4. In your capacity as attorney for defendant what duties do you perform in respect of the serving upon that Company by the Interstate Commerce Commission of its notices and processes?

A. On February 16, 1911, I filed with the Interstate Commerce Commission my designation as statutory agent for the Oregon-Washington Railroad & Navigation Company, upon whom service of all notices and processes might be made for and on behalf thereof, in accordance with Section 6 of the “Commerce Court Act,” approved June 18th, 1910. Said designation was dated January 30th, 1911, and was

duly executed for the Company by its President and Secretary, under the corporate seal. Since February 16, 1911, the Interstate Commerce Commission has served upon me for said defendant all notices and processes that have been served upon said Company by it.

Q. 5. What, if anything, do you know about a certain order of the Interstate Commerce Commission dated June 28th, 1911, entitled, "In the Matter of the Method and Form of Monthly Reports of Hours of Service of Employees on Railroads subject to the Act of March 4, 1907."?

(Here Mr. Kent noted an objection on the ground of incompetency, irrelevancy and immateriality.)

A. My record shows that on July 6th, 1911, a copy of said order was served upon me for Oregon-Washington Railroad & Navigation Company, and certain other carriers, and that the copy served upon me for said Company was mailed by me on the same date, namely, July 6, 1911, to Mr. J. P. O'Brien, Vice President and General Manager thereof, Portland, Oregon.

Q. 6. Have you a copy of the order as served upon you and can you attach it to your deposition?

(Objected to as incompetent, irrelevant and immaterial.)

A. I have; and attach same hereto marked "Bates-Exhibit I".

Q. 7. Are you certain that this copy you present and have identified by marking "Bates-Exhibit I" is in the exact words as the copy served upon you and to which you make reference above?

(Objected to as incompetent, irrelevant and immaterial.)

A. I can only say that the copy attached hereto has been received by me informally from the office of the Interstate Commerce Commission, as a copy of the order referred to, and personally I have no doubt that it is an exact copy as served upon me.

Q. 8. On the copy which was served upon you for defendant was there any interlineation or striking out of any of the words or parts thereof to show that there was a correction?

(Objected to as incompetent, irrelevant and immaterial.)

A. There was not.

Q. 9. You have submitted here only a one-page copy of this order, whereas the order itself refers to certain "accompanying forms, entitled, 'Interstate Commerce Commission Hours of Service Reports' ". Are you certain that no forms or other papers of any kind were attached to the order as served upon you?

(Objected to as incompetent, irrelevant and immaterial.)

A. I am certain that there were no forms or other papers of any kind attached to said order and served upon me.

Chas. H. Bates.

Cross-examination by Mr. Kent.

X-Q.1. Mr. Bates, did you ever receive from the Interstate Commerce Commission on behalf of the defendant herein, a copy of an order, dated April

8th, 1912, "In the Matter of Alteration in the Method and Form of Monthly Reports of Hours of Service of Employees on Railroads Subject to the Act of March 4, 1907"?

A. I did. My record shows such order was received by me on June 5, 1912.

X-Q. This order refers to certain "accompanying forms, entitled 'Interstate Commerce Commission Hours of Service Reports' and designated as "forms Nos. 1 to 8, inclusive. At the time of your receipt of the order in question from the Commission, did you also receive on behalf of said defendant, copies of the designated forms?

A. I did receive with the order of April 8, 1912, the forms therein mentioned.

Chas. H. Bates.

BATES' EXHIBIT I.

INTERSTATE COMMERCE COMMISSION.

ORDER.

At a General Session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 28th day of June, A. D. 1911.

Present:

Judson C. Clements,
Charles A. Prouty,
Franklin K. Lane,
Edgar E. Clark,
James S. Harlan,
Charles C. McChord,
Balthasar H. Meyer,
Commissioners.

IN THE MATTER OF THE METHOD AND FORM OF MONTHLY REPORTS OF HOURS OF SERVICE OF EMPLOYEES ON RAILROADS SUBJECT TO THE ACT OF MARCH 4, 1907.

The method and form of monthly reports of hours of service of employees upon railroads subject to the Act of March 4, 1907, having been considered by the Commission:

IT IS ORDERED, that all carriers subject to the provisions of the act entitled "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, report within 30 days after the end of each month, under oath, all instances where employees subject to said act have been on duty for a longer period than that provided in said Act.

IT IS FURTHER ORDERED, that the accompanying forms entitled "Interstate Commerce Commission Hours of Service Report", and the method embodied in the instructions therein set forth, be, and the same are hereby, adopted and prescribed; and all common carriers subject to said act are hereby notified to use and follow the said prescribed forms and method in making monthly reports of hours of service of employees on duty for a longer period than that named in said act, commencing with and making the first report for the month of July, 1911.

AND IT IS FURTHER ORDERED, that copies of said forms, together with a copy of this

order, be forthwith served upon all common carriers subject to said act.

A true copy:

Judson C. Clements,

Chairman.

Thereupon said cause was submitted to the court, upon motion made by the plaintiff to enter judgment as prayed for in the complaint, and upon motion made by defendant to enter judgment in favor of the defendant, upon the ground and for the reason that upon the facts established by the evidence in the case no violation of law as alleged in plaintiff's complaint has been established, but to the contrary the plaintiff had failed to make out or establish its cause of action upon any count alleged.

Said cause was argued by counsel and submitted to the court, whereupon the court having taken the case under advisement denied said contention of the defendant and overruled its motion, to which ruling of the court defendant notes an exception, and its exception is now allowed by the court, and the court thereupon granted the motion of the plaintiff and entered judgment in favor of the plaintiff and assessed a fine of \$100.00 for each count set forth in the complaint herein, being a total penalty of \$3000.00, together with the costs and disbursements of the plaintiff, to which ruling the defendant noted an exception and its exception was allowed.

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 1752.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a corporation,

Defendant.

AT LAW.

Stipulation Concerning Bill of Exceptions

It is hereby stipulated and agreed, by and between the plaintiff and the defendant, in the above entitled cause, by their respective attorneys, that the bill of exceptions hereto attached embodies all of the exceptions proposed by either party herein to said cause, and that there are no amendments or proposed amendments thereto; that said bill of exceptions may be settled by the Judge of said court in the manner provided by the rules of said court without objection by either party hereto.

Dated this 29th day of June, A. D. 1914.

(Signed) FRANCIS A. GARRECHT,

U. S. Attorney,

OTIS B. KENT,

Special Assistant U. S. Attorney,

Attorneys for Plaintiff.

(Signed) HAMBLIN & GILBERT,

Attorneys for Defendant.

Endorsements: Stipulation.

Filed June 29th, 1914.

W. H. HARE, Clerk,

By F. C. Nash, Deputy.

Order Settling and Allowing Bill of Exceptions

The foregoing Bill of Exceptions, duly and within the time allowed by law, proposed by defendant, is hereby upon stipulation of the parties hereto, duly settled and allowed as defendant's bill of exceptions, and it is certified that the same contains the entire record submitted to the court and that same contains all evidence introduced upon the case and upon which the judgment of the court was rendered.

Dated this 3rd day of August, A. D. 1914.

(Signed) FRANK H. RUDKIN,

United States District Judge who presided
at the trial of said cause.

Endorsements: Bill of Exceptions.

Received at the Clerk's office May 27, 1914, and filed, after being settled and allowed by Court, in the U. S. District Court for the Eastern District of Washington, August 3, 1914.

W. H. HARE, Clerk,
By Frank C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 1752.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a corporation,

Defendant.

AT LAW.

Stipulation

It is stipulated and agreed by and between counsel for the respective parties to this cause, by and through their attorneys of record, that with respect to the printing of the record of this cause for the purpose of its being heard in the Circuit Court of Appeals, this court, if it shall be so advised, may make an order directing the clerk of this court to omit from the printed record certain portions of the record as filed; that is to say, that the 2nd to the 30th cause of action, inclusive of the Government's complaint in this cause, be omitted from the printed record, and that there be substituted in place thereof a description of the same as follows:

"Said complaint contained 29 additional causes of action of the same tenor and effect, and in precisely the same words and figures as the first cause of action; except that the dates wherein defendant was alleged to have continued in default with respect to said reports were alleged to be respectively from the 2nd day of May, 1913, to the 17th day of May, 1913, both dates inclusive and intervening Sundays excepted, and from the 1st day of July, 1913, to the 18th day of July, 1913, both dates inclusive, Fourth of July and intervening Sundays excepted.

Wherefore, plaintiff prays judgment against defendant in the sum of \$3000.00 and its costs herein expended."

Also, that the caption and first cause of action alleged in the Government's complaint shall be printed in full.

Also, that in printing the bill of exceptions and record in this case, those certain documents consisting of many sheets, being certified copies of hours of service reports of the defendant company offered in evidence by plaintiff and referred to in bill of exceptions at the bottom of page 2 and top of page 3 thereof, be omitted from the printed record, and that the following description thereof be considered as part of said bill of exceptions, and be taken and deemed a sufficient printed record thereof, to-wit:

“Report of excess service for month of March, 1913, made by Oregon-Washington Railroad & Navigation Company, received by the Commission April 21, 1913, in which the name of B. G. Bishop does not appear, consists of 1 sheet on form 1, being the oath of C. J. Sutherland, Assistant General Manager of the Oregon-Washington Railroad & Navigation Company, subscribed and sworn to by him on April 16, 1913, to which was attached 19 sheets of form 2, showing 70 employes of defendant on duty more than 16 consecutive hours for various reasons in each sheet set forth; 3 sheets on form 5, containing the names of 8 employes on duty more than 16 consecutive hours; 5 sheets on form 6, showing 10 employes of defendant company to have been on duty more than 9 hours in any 24-hour period; and 2 sheets on form 7, showing 2 operators on duty for a longer period than 13 hours in any 24-hour period, at offices operated only in the daytime, the latter sheet being designated ‘Supplemental Report,’ and received from defendant company by Interstate Commerce Commission on September 2, 1913, and cov-

ering the over-time of B. G. Bishop referred to in complaint of plaintiff.

“Report of excess service for month of May, 1913, made by Oregon-Washington Railroad & Navigation Company, received by the Commission June 26, 1913, in which the name of B. G. Bishop does not appear, consists of 1 sheet on form 1, subscribed and sworn to by C. J. Sutherland, Assistant General Manager of the Oregon-Washington Railroad & Navigation Company, to which was attached 7 sheets on form 2, showing 30 employes on duty more than 16 consecutive hours for various reasons in each sheet set forth; 5 sheets on form 6, showing 7 employes on duty more than 9 hours in any 24-hour period for various reasons in each sheet set forth; 2 sheets on form 7, showing 2 employes on duty more than 13 hours in any 24-hour period for the reasons in each sheet set forth, the latter sheet of which is designated ‘Supplemental Report,’ and was received from defendant company by Interstate Commerce Commission on September 2, 1913, and covers the hours of service of B. G. Bishop, the party referred to in plaintiff’s complaint.”

It is further stipulated and agreed that in the event that either party shall desire said original Government’s exhibit, being the certified copies of report of excess service for the months of March and May, A. D. 1913, they may apply to the presiding judge of the District Court, the opposite party consenting, for a rule or order for the safe-keeping and transporting of said original documents to the Circuit Court of Appeals and return therefrom, under Sec-

tion 4 of Rule 14 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Spokane, Washington, this 21st day of August, A. D. 1914.

(Signed) A. C. SPENCER and
HAMBLÉN & GILBERT,
Attorneys for Plaintiff in Error.

(Signed) FRANK A. GARRECHT,
Attorney for Defendant in Error.

Endorsements: Stipulation.

Filed in the U. S. District Court for the Eastern District of Washington, August 21, 1914.

W. H. HARE, Clerk,
By Frank C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 1752.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a corporation,
Plaintiff in error,

vs.

UNITED STATES OF AMERICA,
Defendant in error.

AT LAW.

Petition for Writ of Error

And comes now the plaintiff in error, Oregon-Washington Railroad & Navigation Company, a corporation, (defendant in the action), and says, that on or about the 27th day of May, A. D. 1914, the above entitled District Court entered a judgment

herein in favor of the plaintiff, United States of America, and against the defendant, Oregon-Washington Railroad & Navigation Company, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the Assignment of Error which is attached to and filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

(Signed) A. C. SPENCER,

(Signed) HAMBLÉN & GILBERT,

Attorneys for Plaintiff in Error

Oregon-Washington Railroad & Nav. Co.

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 1752.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a corporation,

Plaintiff in Error.

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

AT LAW.

Assignment of Errors

Plaintiff in error, the Oregon-Washington Railroad & Navigation Company, hereby assigns the following errors committed by the Trial Court:

1. The trial court erred in overruling the defendant's objection to the introduction of the certified copies of the reports filed by the defendant with the Interstate Commerce Commission. These reports were the printed forms of reports required to be used and filed by carriers under the order of the Interstate Commerce Commission of June 28, 1911, and contained the report of the defendant of hours of excess service of certain of its employees, occurring during the months of March and May, 1914.

2. The trial court erred in denying defendant's motion to enter judgment in its favor, which motion was made at the close of all the testimony, and was based upon the ground that upon the facts established by the evidence in the case, no violation of law as alleged in plaintiff's complaint had been established, and upon the further ground that the plaintiff had failed to make out or establish its cause of action upon any count alleged.

3. The trial court erred in entering judgment in favor of the plaintiff and against the defendant.

WHEREFORE, plaintiff in error prays that said judgment of the District Court be reversed and the said District Court ordered to enter judgment dismissing the action.

(Signed) A. C. SPENCER,

(Signed) HAMBLIN & GILBERT,

Attorneys for Plaintiff in Error.

On consideration of the foregoing petition and assignments of error attached thereto, the court does allow the Writ of Error to Defendant, Oregon-Washington Railroad & Navigation Company, upon giving bond according to law in the sum of Four Thousand Dollars (\$4000.00), which shall operate as a supersedeas bond.

Dated this 4th day of August, 1914.

(Signed) FRANK H. RUDKIN,
United States District Judge for the Eastern District of Washington, Northern Division, who tried said cause and entered said judgment.

Endorsements: Petition for Writ of Error, Order Allowing Writ of Error and Assignment of Errors.

Filed in the U. S. District Court for the Eastern District of Washington, August 4, 1914.

W. H. HARE, Clerk,
By Frank C. Nash, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1752.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation,

Plaintiff in error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

AT LAW.

Writ of Error

(Lodged Copy.)

THE UNITED STATES OF AMERICA,

Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable
Judge of the District Court of the United States,
for the Eastern District of Washington, Northern
Division, Greeting:

Because in the record and proceedings, as also
in the rendition of the judgment, of a plea which
is in the said District Court before you, between the
United States of America, plaintiff, and the Oregon-
Washington Railroad & Navigation Company, a cor-
poration, defendant, a manifest error hath happened,
to the great damage of the said defendant, the Oregon-
Washington Railroad & Navigation Company, a cor-
poration, as by its complaint appears, we being willing
that error, if any hath been, should be duly corrected,
and full and speedy justice done to the parties afore-
said in this behalf do command you, if judgment be
therein given that then under your seal, distinctly
and openly, you send the record and proceedings afore-
said, with all things concerning the same, to the
United States Circuit Court of Appeals, for the Ninth
Circuit, together with this writ, so that you have the
same at San Francisco on the First day of Septem-
ber, 1914, in the said Circuit Court of Appeals for
the Ninth Circuit, to be then and there held, that the
record and proceedings being inspected, the said Cir-
cuit Court of Appeals may cause further to be done

therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 4th day of August, in the year of our Lord, one thousand nine hundred and fourteen.

(Signed) W. H. HARE,
Clerk U. S. District Court, for the Eastern District
of Washington, Northern Division.

By Frank C. Nash, Deputy.

(SEAL)

ALLOWED BY:

FRANK H. RUDKIN,
Judge.

Endorsements: Service Accepted this 4th day of
August, 1914.

(Signed) F. A. GARRECHT,
U. S. Attorney.

Writ of Error (Lodged Copy.)

Filed in the U. S. District Court for the Eastern
District of Washington, August 4, 1914.

W. H. HARE, Clerk.
By Frank C. Nash, Deputy.

*In the United States District Court, for the Eastern
District of Washington, Northern Division.*

No. 1752.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a corporation,
Plaintiff in error,

vs.

UNITED STATES OF AMERICA,
Defendant in error.

AT LAW.

Supersedeas and Cost Bond on Writ of Error

KNOW ALL MEN BY THESE PRESENTS,
that we, Oregon-Washington Railroad & Navigation
Company, (a corporation) as principal, and National
Surety Company, (a corporation organized under the
laws of the State of New York for the purpose of
doing business as a Surety, and which has complied
with the statutes of the United States authorizing
it to become a surety of bonds in the Courts of the
United States), as surety, are held and firmly bound
unto the United States of America, in the just and
full sum of four thousand and no-100 dollars
(\$4000.00), to be paid unto the said above named
United States of America, its attorneys, officers or
assigns, to which payment, well and truly to be
made, we bind ourselves, our successors and our as-
signs jointly and severally firmly by these presents.

Sealed with our seals and dated this 3d day of
August, A. D. 1914.

Upon the conditions that:

WHEREAS, lately at a session of the United

States District Court for the Eastern District of Washington, Northern Division, in a suit pending in said court between the United States of America, and the Oregon-Washington Railroad & Navigation Company, a corporation, a judgment was rendered against said defendant in the sum of Three thousand dollars (\$3000.00), and costs amounting to-----dollars, (\$----); and,

WHEREAS, said defendant conceiving itself aggrieved thereby, has obtained from said Court a writ of error to reverse and correct said judgment in that behalf and a citation directed to the above named defendant in error admonishing said defendant in error to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California within the time therein fixed; and,

WHEREAS, an order has been entered requiring said defendant to file supersedeas bond and cost bond in the aggregate sum of four thousand dollars (\$4000.00);

NOW, the condition of the above obligation is such that if the said Oregon-Washington Railroad & Navigation Company, a corporation, shall prosecute its said writ of error to effect, and answer all damages and costs if it fails to make its plea good in said Court, then the above obligation to be void; otherwise to remain in full force and virtue.

This bond is intended as a bond for costs on appeal and as a supersedeas Bond.

(Signed) OREGON-WASHINGTON RAILROAD &
NAVIGATION CO.,

By: HAMBLÉN & GILBERT,

Its Agents and Attorneys.

NATIONAL SURETY CO. OF N. Y.,

By JAMES BROWN, Res. Vice Pres.,

Attest: F. L. JONES, Res. Asst. Secty.

The foregoing bond is hereby approved this 4th day of August, 1914, and the same when filed shall operate as a bond for costs on appeal and as a Supersedeas Bond.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Supersedeas Bond and Cost Bond on Writ of Error.

Filed in the U. S. District Court for the Eastern District of Washington, August 4, 1914.

W. H. HARE, Clerk,

By Frank C. Nash, Deputy.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 1752.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

AT LAW.

Citation on Writ of Error

(Lodged Copy.)

UNITED STATES OF AMERICA,

EASTERN DISTRICT OF WASHINGTON,—ss.

TO THE UNITED STATES OF AMERICA, and

to Francis A. Garrecht, its Attorney, Greetings:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States, Eastern District of Washington, Northern Division, wherein the Oregon-Washington Railroad & Navigation Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Spokane in said District, this 4th day of August, 1914.

(Signed) FRANK H. RUDKIN,

Judge.

(SEAL)

Endorsements: Service of within Citation accepted this 4th day of August, 1914.

(Signed F. A. GARRECHT,

U. S. Attorney.

Citation. (Lodged Copy.)

Filed in the U. S. District Court for the Eastern District of Washington, August 4, 1914.

W. H. HARE, Clerk,
By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1752.

UNITED STATES OF AMERICA,

Plaintiff,

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a corporation,

Defendant.

Pracipe for Transcript

To the Clerk of the above-entitled court:

You will please prepare transcript of the complete record in the above-entitled case to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the writ of error to be perfected to said court, and include in said transcript the following proceedings, pleadings, papers, records and files, to-wit:

1. Complaint.
2. Answer.
3. Stipulation of Agreed Statement of Facts.
4. Stipulation Waiving Trial by Jury.
5. Opinion.
6. Judgment.
7. Bill of Exceptions and Certificate.
8. Assignment of Errors.

9. Petition for Writ of Error.
10. Order Allowing Writ of Error and fixing Bond.
11. Supersedeas Bond and Bond for Costs.
12. Citation.
13. Writ of Error.
14. Praecipe for Transcript of Record.
16. Stipulation Extending time to file Bill of Exceptions.
17. Stipulation as to Printing record.

—and any and all records, entries, pleadings, proceedings, papers, filings necessary or proper to make a complete record upon said writ of error in said cause. Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

(Signed) ARTHUR C. SPENCER and
HAMBLEN & GILBERT,

Attorneys for Defendant.

Endorsements: Praecipe for Transcript of Record.

Filed in the U. S. District Court for the Eastern District of Washington, August 11, 1914.

W. H. HARE, Clerk,
By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No.----- --

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant.

**Certificate of Clerk U. S. District Court to
Transcript of Record**

UNITED STATES OF AMERICA,
Eastern District of Washington,—ss.

I, W. H. HARE, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing printed pages, numbered from 1 to 43, inclusive, constitute, and are a true and correct copy of the record, pleadings, testimony and all proceedings had in said action as called for by the defendant and the plaintiff in error in its praecipe for a transcript of the record herein, as the same remain on file and of record in said District Court, and that the same which I transmit constitute my return to the annexed Writ of Error lodged and filed in my office on the 4th day of August, 1914. I also annex and transmit the original citation in said action.

I further certify that the cost of preparing, certifying and printing the foregoing transcript and record amounts to the sum of \$75.65, which sum has been paid in full by Hamblen & Gilbert, attorneys for defendant and plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at the city of Spokane, in the Eastern District of Washington, Northern Division, in the Ninth Judicial Circuit, this 26th day of August, 1914, and in the Independence of the United States of America, the one hundred and thirty-ninth.

(Signed) W. H. HARE,
Clerk, U. S. District Court for the
Eastern District of Washington.

(SEAL)

2

No. 471

**United States Circuit Court of Appeals,
Ninth Circuit.**

OREGON-WASHINGTON RAILROAD AND NAVIGATION
COMPANY, A CORPORATION, PLAINTIFF IN ERROR,

v.

THE UNITED STATES OF AMERICA, DEFENDANT IN
ERROR.

*UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.*

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

FRANCIS A. GARRECHT,
United States Attorney.

PHILIP J. DOHERTY,
Special Assistant United States Attorney.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1914

Filed

SEP 21 1914

F. D. Monckton,
Clerk.

In the United States Circuit Court of Appeals, Ninth Circuit.

OREGON-WASHINGTON RAILROAD & NAVI- gation Co., a Corporation, plaintiff in error,	}	No. .
<i>v.</i>		
THE UNITED STATES OF AMERICA, DE- fendant in error.	}	

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

This case was instituted for violation of order made June 28, 1911, by the Interstate Commerce Commission requiring monthly reports of carriers in all instances where employees subject to the hours of service act have been on duty for a longer period than that provided in said act. The authority for said order is to be found in the amendment to section 20 of the act to regulate commerce made by section 14 of chapter 309 of the act of 1910 (36 Stat. L., 539, 556), as follows:

The Commission shall also have the authority by general or special order to require said carriers or any of them to file periodical

or special, or both periodical and special, reports concerning any matters about which the Commission is authorized or required by this or any other law to inquire or to keep itself informed, or which it is required to enforce; and such periodical or special reports shall be under oath whenever the Commission shall require; and if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the Commission, it shall be subject to the forfeiture last above provided.

This case is brought as an action for debt in 30 counts and is based upon the alleged failure of the defendant for 30 days to report to the Interstate Commerce Commission certain instances wherein employees in its service were on duty for longer periods than those permitted by the hours-of-service act.

The answer of the defendant admitted its interstate character and also that it had omitted to report the particular instances of excess service set forth in the declaration. The essential facts were submitted in a stipulation wherein a jury was waived and the case was tried by the court.

As to counts 1 to 15, inclusive, the stipulation admitted that the defendant, on May 1 to 3, 5 to 10, and 12 to 17, all inclusive, had failed to report to the Interstate Commerce Commission, as required by its order of June 28, 1911, the fact that on March 27, 1913, an operator in its service, to wit, one B. G.

Bishop, had remained on duty from 7.30 a. m. until 11.15 p. m.

As to counts 16 to 30, inclusive, the stipulation admitted the failure of the defendant to report, as aforesaid, on July 1 to 3, 5, 7 to 12, 14 to 18 the fact that on May 23, 1913, the said B. G. Bishop had remained on duty from 6.30 a. m. until 8.05 p. m.

There was introduced, over defendant's objection and exception, certified copies of the reports submitted by the defendant to the Interstate Commerce Commission, purporting to show and comprehend all instances wherein employees, during the months of March and May, 1913, had been on duty longer than the statutory periods; together with two supplemental reports covering the instances of excess service here involved, both of which were shown in the certificate to have been received at the office of the Commission on September 2, 1913, subsequent to the period here in issue. The stipulation admitted that no report of these instances had been made by or in behalf of the carrier before September 2, 1913. A deposition of Charles H. Bates, an attorney of Washington, D. C., was introduced by defendant to the effect that he was, and had been since February 16, 1911, the representative of the defendant at Washington, D. C., upon whom all orders issued by the Interstate Commerce Commission, applying to or affecting the defendant herein, had been served; that the order of the Commission dated June 28,

1911, here involved, had been served upon him and by him submitted to the Oregon-Washington Railroad & Navigation Co.; but that with said order as so served no forms were attached. The order of the Interstate Commerce Commission requiring monthly reports of carriers appears in full on pages 23 and 24 of the record.

The case stands solely on the stipulation printed in full in record, pages 7-8 and 17, 18, and 19, and the deposition of Charles H. Bates, record, pages 20, 21, and 22.

It was admitted that the forms used in making reports to the Interstate Commerce Commission were identical in form with those prescribed in the Commission's order of June 28, 1911.

The defendant at the trial relied entirely upon the alleged insufficiency of the service of this order, and moved the court to enter judgment for the defendant. This motion was denied, and defendant duly excepted thereto.

Judgment was entered for the plaintiff.

QUESTIONS INVOLVED.

- I. Does the fact that the Government was unable to show that when the order requiring monthly reports was served on this carrier's agent the established forms upon which such reports were to be made were also served, constitute a defense to such carrier when sued for failure to include in reports actually made upon such forms specific cases of excess service of railroad employees?**
- II. Was it error to admit in evidence certified copies of reports made by this carrier to the Interstate Commerce Commission for the purpose of showing**

the omission therefrom of certain particular cases of excess service of employees?

ARGUMENT.

Although the learned judge of the district court in the course of his opinion says that the names of employees specified in the complaint were omitted by “inadvertence” or “mistake,” the stipulation (Rec., p. 28) on which the case was tried gives no reason, cause, or excuse for the nonappearance of these names in the report made to the Interstate Commerce Commission.

So all argument upon the basis of accident, inadvertence, or mistake in the making of the report is excluded from consideration here.

An examination of the record shows that the sole defense interposed, as stated by the judge of the district court (Rec., p. 13), “that a copy of the forms was not served upon the company together with the order as required by law and by the order of the Commission.” (Order of Interstate Commerce Commission, June 28, 1911.)

It was conceded at the trial in the district court that reports which the plaintiff in error *did* file for the months in question in this action “were identical *forms* of reports required to be used and filed by carriers under the order of the Interstate Commerce Commission on June 28, 1911.” (Rec., p. 19.) (Our italics.)

The forms in question were prepared by the Interstate Commerce Commission, and forms iden-

tical therewith were in use by this carrier for the purposes prescribed in the Commission's order.

The furnishing of forms for the transmission of reports seems to be complete when such forms are found in the possession of the carrier and are in use by it for the prescribed purpose.

Service of the order is admitted. The order refers to accompanying forms, and forms identical in character with the prescribed "accompanying forms" are in use by this carrier.

That no formal service of accompanying forms may now be possible of proof seems to be no defense for omissions in reports made by the carrier upon the identical forms established by the Commission's order.

As this is a highly technical defense it may not be out of place to say that it would seem as if the fact was not proved that no forms *accompanied* the order when service was made on Mr. Bates merely by his declaration (Rec., p. 22) that no forms or papers of any kind were "*attached* to said order."

Non constat, because no forms were *attached* to the order, that such forms did not *accompany* the order.

Whatever probative force may or may not be given to Mr. Bates's deposition, it is clear that a legal order of the Interstate Commerce Commission was served upon him which referred to accompanying forms and that such forms are in use by this carrier.

When in the exercise of power properly delegated to the Interstate Commerce Commission an order is issued by that Commission requiring reports and establishing forms therefor no service of such order or forms is an essential to the vitality of such order. The courts take judicial notice of such regulations when officially made and promulgated, and those whose conduct is affected by such orders are bound to obey the same without proof of actual notice of such regulations.

Regulations of the Post Office, the Interior, and the War Departments are familiar examples of this rule. (*Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S., 194, and cases therein cited.)

The method of promulgation is directory and not mandatory.

But in this case there is not only notice and knowledge on the part of the carrier of the forms and the identical tenor thereof, but there is use made of them by the carrier in attempted compliance therewith.

II.

Certified copies of the carrier's reports were admissible.

By section 16 of the act to regulate commerce these reports are public records and copies certified by the secretary under the Commission's seal shall be received in evidence with like effect as the originals.

But even if this were not the clear rule of law, there was no prejudice to the interests of the car-

rier from the introduction of these certified copies of its reports for the reason that the only relevant evidence deducible therefrom was also clearly before the court in the stipulation of both parties.

III.

Carrier's motion for judgment was properly overruled.

The stipulations in the case established all the essential elements of a case for the plaintiff. There was no conflict of evidence and no contradiction of fact. As far as the stipulation goes there was nothing disputed.

Summarizing the facts of the stipulation there was undisputed proof of—

1. Excess service of specified employees engaged in interstate commerce on a railroad engaged in interstate commerce.

2. Omission of the names of such specified employees from the monthly reports which the carrier was required by law to make to the Interstate Commerce Commission.

No element necessary to make out a case is wanting and there was no error in the direction of a verdict for the Government on all counts of the complaint.

Respectfully submitted.

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United States Attorney.

PHILIP J. DOHERTY,
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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OREGON - WASHINGTON RAILROAD AND
NAVIGATION COMPANY, a corporation,
Plaintiff in Error.

VS.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error in the United States District Court
for the Eastern District of ~~Oregon~~ Washington
Northern Division.

Filed

OCT 26 1914

F. D. Monckton,
Clerk.

No. 2471

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NAVIGATION COMPANY, a corporation,
Plaintiff in Error.

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

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OREGON-WASHINGTON RAILROAD AND
NAVIGATION COMPANY, a corporation,
Plaintiff in Error.

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

STATEMENT OF THE CASE.

By an Act approved March 4, 1907, effective one year thereafter, commonly known as the Hours of Service Act, the Congress of the United States, declared it unlawful for any common carrier by railroad, engaged in interstate commerce, to require or permit any employe actively engaged in or connected with the movement of any train, to be or remain on duty for a longer period than certain designated hours. The Act charges the Interstate Commerce Commission with the duty of enforcing its provisions,

“And all powers granted to the Interstate Commerce Commission, are hereby extended to it in the execution of this Act.” (Section 4.)

The penalty prescribed is a sum not exceeding Five Hundred (\$500.00) Dollars, and no action shall be brought for its recovery after the expiration of one year after the date of such violation.

Without stating the history of the legislation, let it be recalled that the Congress, by the act of June 18, 1910, (Chap. 309, 36 Stat. 556), amended Section 20 of the Act to regulate commerce, as the same existed as

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amended June 29, 1906 (43 Stat. 584) and February
25, 1909 (35 Stat. 648), which said Acts finally define
the “granted powers” of the Interstate Commerce Com-
mission, to which Section 4 of the Hours of Service
Act refers.

By Section 20 of the Act to regulate commerce, as
amended, the Interstate Commerce Commission is
clothed with powers of search and seizure, together with
the right to require information in the remotest detail
as to such common carriers. Among other things, the
Commission has power as follows:

- (a) To require annual reports.
- (b) To prescribe manner in which such reports
shall be made.
- (c) To require specific answers to all questions
upon which the Commission may need information.
- (d) To obtain information as to rates, regulations,
agreements, arrangements or contracts.
- (e) To require compliance within a definite time.
- (f) To prescribe a uniform system of accounts as
near as may be.
- (g) To require that reports shall be made out under
oath.
- (h) To require monthly reports of earnings and
expenses.
- (i) To file periodical or special, or both periodical
and special reports.

The statute also prescribes what these reports shall
contain. For example, the annual report is required
to contain information complete and in great detail con-
cerning fifteen or more general subjects relating to
carriers, among which are the following:

1. The amount of capital stock.
2. The amounts paid therefor.
3. The manner of payment.
4. The dividends paid.
5. The surplus fund, if any.
6. The number of stockholders.
7. The funded and floating debt and interest paid thereon.
8. The cost and value of the property.
9. The number of employees and salaries.
10. The accidents to persons and property and the causes therefor.
11. The amount expended for improvements, how expended, and the character of the same.
12. The earnings and receipts from each branch of the business and from all sources.
13. The operating and other expenses.
14. The balance of profit and loss.
15. A complete exhibit of financial operations, including annual balance sheet.
16. Any statistics for twelve months as may be required by the Commission.

Moreover, this statute, Section 20, also requires the periodical or special report to contain:

1. A report of the earnings and expenses per month.
2. Information concerning any matters about which the Commission is authorized or required, by this or *any other law to inquire*, or to keep itself informed, or *which it is required to enforce*.

Section 4 of the Hours of Service Act, heretofore referred to, extends these powers to the Interstate Com-

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merce Commission in the enforcement of the provisions
of that Act.

Baltimore & Ohio Ry. Co. v. I. C. C., 221 U. S.
612.

Section 20 of the Act to regulate commerce contains
a penalty clause as follows:

“1-a. If any carrier . . . shall fail to make and
file said annual reports within the time limit, or

(b) Shall fail to make specific answer to any ques-
tion authorized by the provisions of this section, within
thirty days from the time it is lawfully required so to do,
*such party shall forfeit to the United States One Hun-
dred Dollars for each day it shall continue to be in de-
fault with respect thereto.*

2. If any carrier shall fail to make any such period-
ical or special report within the time fixed by the Com-
mission it shall be subject *to the forfeitures last above
provided.*”

Before stating the facts of the case at bar, it seems
proper that we ascertain the limits and the confines of
the statute in question.

It will be noted that the forfeitures above authorized
and the contingency under which they arise, are the same
in each case, and are for a failure:

(a) To file said annual report, or
(b) To make specific answers to any question, or
(c) To file any such periodical report,
within a limited time in the act, or in the Commission’s
order stated.

It is further obviously clear and plainly apparent
that the statute does not penalize, by forfeiture, any
carrier who, within the time limited, files the annual or
periodical report, or made answers to the Interstate
Commerce Commission’s question; but whose reports,

annual or periodical, contains inadvertent errors or omission, rectifiable upon notice, or whose answers to the Interstate Commerce Commission's legally authorized questions, are not as specific as the Commission may desire the same to be. Or to state the proposition differently, the statute does not penalize a carrier in omitting from such report, annual or periodical, some of the information called for therein, nor in substantially, *but not absolutely*, making specific answers to any authorized questions of the Interstate Commerce Commission.

And, moreover, applying the construction illustrated and contended for here to the case at bar, the facts of which we will presently state, the statute does not penalize a carrier if it, "shall omit to specify in any such report it files, any instance of excessive service required to be reported therein." In other words, it is *failure to file a report*, which is the offense and not the *omission from a report filed in good faith and with an honest attempt to comply with the law, an instance or item which should have been included therein, or a mistake in the information which the report contains*.

N. P. Ry. Co. v. U. S., 213 Fed. 162, 168.

U. S. v. Four Hundred Twenty Dollars (D. C.),
162 Fed. 803, 804.

Bonnell v. Griswold, 80 N. Y. 128, 132, 133.

Pier v. Hanmore, 86 N. Y. 95, 100.

Matthews v. Patterson, 16 Colo. 215; 26 Pac. 812,
813.

COMMERCE COMMISSION EXERCISES POWER.

Under the authority granted, the Interstate Commerce Commission on June 28, 1911, made and entered an order (Transcript folio 30), requiring a periodical report from all carriers subject to the hours of service act. This order contains two clauses:

(a) The duty to report within thirty days after each month, under oath, all instances where employees, subject to the act, have been on duty for a longer period than that provided for in said act, and

(b) The duty to use the forms provided and to follow the instructions therein set forth.

A perusal of this order will convince the Court that the first clause thereof cannot be complied with, but by using the forms and following the instructions contained in the second clause. The use of any other forms would not be a compliance with the two clauses of the order, and obviously the failure to use some other forms would not be included within a charge of having failed to use these forms in complying with the two clauses of the order.

THE CASE AT BAR.

On August 4, 1913, the Government filed its complaint in the Court below for the purpose of recovering the sum of Three Thousand (\$3000.00) Dollars upon thirty causes of action, each for the recovery of One Hundred Dollars. The plaintiff in error is alleged to have violated the order of the Interstate Commerce Com-

mission above referred to, made on June 28, 1911, in pursuance of Section 20 of the Act to regulate commerce, as amended. The Government alleges (folio 3) that defendant, "having theretofore failed to make and file with said Commission in any form whatsoever, a report of all the instances wherein its employees, subject to said 'act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon,' approved March 4, 1907, were on duty during the month of March, 1913, for a longer period than that provided in said act, and did on the first day of May, 1913, continue to be in default with respect thereto."

The Government further alleges that the plaintiff in error did fail to make and file with the Commission any report of the instances wherein one B. G. Bishop, a telegraph operator, was on duty for a longer period than that provided in the act. Said default is alleged also to have continued from the second day of May, 1913, to the 17th day of May, 1913, both dates inclusive and intervening Sundays excepted, and from the first day of July, 1913, to the 18th day of July, 1913, both dates inclusive and Fourth of July and intervening Sundays excepted.

THE ANSWER.

The plaintiff in error, for answer to these thirty causes of action, denied each and every allegation contained therein, except that it does admit that it was a common carrier engaged in Interstate Commerce by railroad in the State of Washington, and in the judicial

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district named, and further excepting that it did not report operator Bishop's over-service for the times mentioned in those thirty causes of action, nor prior thereto.

ISSUES.

It will thus be seen, therefore, that the existence of the alleged order of June 28, 1911, is denied, as is also the claim that plaintiff in error failed to make and file with the Commission in any form whatsoever, a report of the instances of over-service in violation of the Hours of Service Act. While the omission of Mr. Bishop's name, which the lower court found was omitted from the list of delinquencies "by inadvertence or mistake" (Transcript, folio 14), is admitted in the pleadings.

EVIDENCE.

The case was tried before the court, a jury being waived (folio 9), upon a stipulation of facts (folio 7, 18); the admission of the pleadings; certified copies of plaintiff in error's Hours of Service Report for the months of March and May, 1913, which said report for the month of March, 1913, was received by the Interstate Commerce Commission, April 21, 1913, showing ninety employees on duty for that month for a period longer than that provided in said act, but in which the name of B. G. Bishop does not appear, and whose name and excessive service was actually report to the Interstate Commerce Commission and received by them on September 2, 1913, which said report for the month of May, 1913, was received by the Interstate Commerce Com-

mission June 26, 1913, in which the name of B. G. Bishop does not appear, and which report shows thirty-nine employees having been on duty during that month for a longer period than that provided in the Act. It also appears that for some reason, presumptively innocent, and presumptively such to which no criminality attached, and which caused the lower court (folio 14), to find, was by inadvertence or mistake, the name of B. G. Bishop was omitted. A sheet containing his name, designated "supplemental report" was received by the Commission, September 2, 1913, almost one month after this action was filed. Also the deposition of one Charles H. Bates, showing that while the order of June 28, 1911, was served upon him, as the attorney in fact for the carrier, in Washington, D. C., yet the forms supposed to be served and which were to accompany the same, were not served upon him.

The record contains all the evidence introduced upon the case on which the judgment of the court was rendered (folio 27), and upon this record defendant moved the court for the entry of a

JUDGMENT IN FAVOR OF THE DEFENDANT

upon the ground and for the reason that by the facts established by the evidence in the case *no violation of law* as alleged in the Government's complaint has been established, but to the contrary the Government had failed to make out or establish its cause of action upon any count alleged.

This motion was overruled and a

JUDGMENT ENTERED AGAINST PLAINTIFF IN ERROR

for Three Thousand Dollars, and the action of the court in overruling this motion and entering said judgment is assigned as error.

POINTS AND AUTHORITIES.

1. The power of the Interstate Commerce Commission to require a periodical report concerning any matters about which the Commission is authorized by law to inquire or to keep itself informed, or which it is required to enforce, and this information respecting hours of service of railroad employees is one of the statutes which it is the duty of the Interstate Commerce Commission to enforce, is no longer open to question.

Baltimore & Ohio Ry. Co. v. I. C. C., 221 U. S. 612.

The amendment of June 18, 1910 (36 Stat. 556), created and penalized a new offense, namely, the failure of a carrier to file its monthly or periodical report of instances of over-service of employees within the time fixed by the Commission.

Northern Pacific Ry. Co. (U. S.), 213 Fed. 162, 167.

36 Cyc. 1181.

2. That portion of Section 20 authorizing the recovery of a forfeiture is penal and must be construed as penal statutes are construed, strictly.

Erbaugh v. U. S., 173 Fed. 433, 435.

U. S. v. Wiltburger, 5 Wheaton 96.

36 Cyc. 1183, 1186.

In construing penal statutes it is the province of the Legislative department to prescribe punishment for acts. The court has no power to impose a punishment not prescribed by the Legislature, and it is always safe and wise to impose no punishment until the court can say that the Legislature has in fact as well as in intent prescribed the same.

U. S. v. Wiltberger, 5 Wheaton 76, 96.

Hackfeld v. U. S., 197 U. S. 442, 450.

Sarlls v. U. S., 152 U. S. 570, 575.

U. S. v. Corbett, 215 U. S. 233, 243.

Northern Pacific Ry. Co. v. U. S., 213 Fed. (CCA) 162.

The natural apparent meaning of the terms of a statute, should always be preferred to any recondite signification, discovered only by study, ingenuity and strong desire.

Northern Pacific Ry. Co. v. U. S., 213 Fed. 162, 168.

U. S. v. 99 Diamonds, 139 Fed. 961, 964.

First National Bank v. U. S., 206 Fed. 374, 376.

The Act of June 18, 1910, under which the order of June 28, 1911, was made, was enacted for the purpose of emasculating certain litigation which the Interstate Commerce Commission had at that time pending in the Supreme Court of the United States, wherein the right to require or demand any form of report respecting over-service was denied.

Baltimore & Ohio Ry. Co. v. I. C. C., 221 U. S. 612.

The right to require reports as to over-service under the hours of service act, prior to June 18, 1910, had been denied by more than one hundred fifty-three railroads, and as a result of this act (June 18, 1910) and

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the decision in the *Baltimore & Ohio Ry. Co.*, 221 U. S.
612) these railroads signified their readiness to comply
with this requirement.

25 Annual Report I. C. C., 1911, p. 83.

The legislation was enacted for the purpose of
penalizing the failure to file the report, and not omitting
an item or instance from a report as filed.

N. P. Ry. Co. v. U. S., 213 Fed. 162, 168.

U. S. v. Four Hundred Twenty Dollars, 162
Fed. 803, 804.

Bonnell v. Griswold, 80 N. Y. 128, 132, 133.

Pier v. Hanmore, 86 N. Y. 95, 100.

Matthews v. Patterson, 16 Col 215; 26 Pac. 812,
813.

If a report as filed is not complete, the remedy is
not to punish as if no report was filed, but to subject the
party making the report to a prosecution for perjury.
The statute requires "such periodical or special report
shall be under oath whenever the Commission so re-
quires." The order of June 28, 1911, requires the car-
rier to "report within thirty days after the end of each
month *under oath*, all instances where employees, sub-
ject to said act, have been on duty for a longer period
than that provided in said act.

N. P. Ry. Co. v. U. S., 213 Fed. (CCA.) 162,
168.

Matthews v. Patterson, 16 Colo. 215; 26 Pac.
812, 813.

Clause 2 of the order of June 28, 1911, with respect
to instructions and forms has been abolished.

See order Interstate Commerce Commission April
8, 1912.

See also folio 18, Transcript Case No. 2490. *O-W.*
R. & N. Co. v. U. S. A. upon writ of error to the Dist-

riect Court of the United States for the District of Oregon.

The omission by a carrier from the periodical report of the instance of excessive service of its employees made and filed in good faith within the time prescribed therefor by the Interstate Commerce Commission under the amendment of Section 20 of the Act to regulate commerce (36 Stat. 556), of one or more instances that should have been included therein, or any mistake of law or fact therein made in good faith, does not subject the carrier to liability for the penalties or forfeiture denounced by that amendment for failure to file a periodical report.

Northern Pacific Ry. Co. v. U. S., 213 Fed.
C. C. A. 162, 168.

ARGUMENT.

Two questions are presented for decision:

1. Can a carrier be penalized for a failure to file a report of over-service as required by an order of the Interstate Commerce Commission, where such report has actually been filed, but one or more instances, or one or more items required, are omitted, either by inadvertence, mistake or otherwise, and

2. Can a recovery of a penalty or forfeiture for the alleged violation of an order of the Interstate Commerce Commission made June 28, 1911, be sustained where a portion thereof has been abolished by the order of the Interstate Commerce Commission made April 8, 1912, and where no forms were provided by which to comply

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with the order of June 28, 1911, and where the order of
April 8, 1912, has not been plead?

On the 21st of April, 1913, the plaintiff in error made a report to the Interstate Commerce Commission of over-service for the month of March, 1913 (Transcript, folio 29). To this report was attached on Form 1, the oath of C. J. Sutherland, the Assistant General Manager of the plaintiff in error, and other forms required by the order of the Interstate Commerce Commission of April 8, 1912, showing a total of ninety men performing over-service for the month of March, 1913. On the 26th day of June, 1913, the plaintiff in error made its report to the Interstate Commerce Commission of the over-service for the month of May, 1913 (folio 30). This report consisted of one sheet on Form 1, containing the oath of Assistant General Manager Sutherland. To this oath, on the forms prescribed by the order of April 8, 1912, was attached information showing thirty-four employees performing over-service for the month of May, 1913. The name of operator Bishop was omitted from each of these reports. Out of one hundred twenty-four instances of over-service for the months of March and May, 1913, only one name, that of operator Bishop was omitted, and the lower court found that the name and excessive hours of service of this employee were omitted therefrom by inadvertence or mistake (Folio 13). It will, therefore, be seen, that a substantially accurate report was filed within the time prescribed by the order of the Commission, and we contend that the statute has been complied with; that the omission of a name or two from the report filed is not an offense, and that no penalty can legally be assessed

against the plaintiff in error under a reasonable and proper construction of the law.

In the ascertainment of a proper construction of the amendment of June 18, 1910, to Section 20 of the Commerce Act, the court, it is suggested, should recall the circumstances under which the power to make the order of June 28, 1911, was obtained. The Interstate Commerce Commission on the 3rd of March, 1908, made and entered an order requiring the carriers, subject to the Hours of Service Act, to make monthly reports, under oath, showing instances where employees, subject to that act, had been on duty for a longer period than that allowed. And on August 15, 1908, made an additional order prescribing new forms and also a separate form of oath for use in case there had been no excessive service.

(See statement of Mr. Justice Hughes in *Baltimore & Ohio Ry. Co. v. I. C. C.*, 221 U. S. 613, 614.)

One hundred and fifty-three railroad companies, prior to this time, had failed to file the reports contemplated by this order (See 25 Annual Report of the I. C. C., 1911, p. 83); and the Baltimore & Ohio Ry. Co., filed a bill in equity in the Circuit Court of the United States for the District of Maryland to annul these orders and for injunction, stating (221 U. S. 613) among other grounds "that the Commission was without authority to make the order, either under the provisions of the act, or otherwise." (221 U. S. 616.)

In view of the history of the legislation bearing upon this question, it will be seen that the Interstate Commerce Commission was asserting the power to require these reports, and many of the railroads of the country, if not all of them, had denied the existence of this power,

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and the only question at issue at that time between carriers and the Commission was whether or not such power had its foundation in law. While the case of *Baltimore & Ohio Railroad Company vs. Interstate Commerce Commission*, 221 U. S. 612 was pending, and prior to the decision rendered therein, Congress amended Section 20 of the act to regulate Commerce by the act of June 18, 1910. This amendment was for the purpose of lodging in the Interstate Commerce Commission the power, the possession of which by the Commission had been denied. The amendment was tacked on to the act to create the commerce court. (Chap. 309, 36 Stat. 556), and reads as follows:

“The Commission shall also have authority by general or special orders, to require said carriers, or any of them, to file monthly reports of the earnings and expenses, and to file periodical or special, or both periodical and special reports, concerning any matter about which the Commission is authorized or required by this or any other law to inquire or keep itself informed, and which it is required to enforce; and such periodical or special reports shall be under oath whenever the Commission so requires.”

The foregoing legislation clearly embraces the power which the Commission was asserting, and it, therefore, became entitled to promulgate an order requiring the periodical and special reports to be made. The effect of this legislation was to settle the legal questions with respect to the power of the Commission to require these reports and dispose of the case then pending in the Federal Supreme Court. The Interstate Commerce Commission in their 25th Annual Report for the year 1911, at page 83, said:

“As a result of this decision, one hundred fifty-three

railroad companies, which theretofore had failed to file reports, have signified their readiness to comply with this requirement."

What was this requirement, and what was it that had been denied? Clearly, it was the right to require a periodical and special report. Theretofore it had been claimed there was no law justifying such a report. For the purpose of creating the power to require the report, this amendment was passed. As a part of the same legislation, it was provided:

"And if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the Commission, it shall be subject to the forfeitures last above provided."

Now, the "forfeitures last above provided" were the forfeitures to which the carriers were subjected if they failed:

(a) To file their annual reports within the time specified, or,

(b) Failed to make specific answers to any question authorized within the time limited.

And the forfeiture was "the sum of One Hundred Dollars for each and every day it shall continue to be in default with respect thereto."

Now, bearing in mind that the purpose of the legislation was to secure a periodical or special report, and that the forfeiture referred to "is for each day it shall continue to be in default with respect thereto," the question arises, what is meant by the words "default with respect thereto;" and what is meant also by the language "shall make and file any such periodical or special report." The natural and reasonable meaning of such language in the light of the history of the legislation and

of the duties of the Commission and their coveted powers, together with the fact that the exercise of these powers were being thwarted and the existence of the power denied by the carriers, is that the carrier does not subject itself to the imposition of the penalty, except it fail to *file any report whatsoever*. Of course, such report would have to be a substantial compliance with the commands of the law. It would have to be an attempt in good faith to comply therewith. It would have to contain, moreover, sufficient of the information required as to rise to the dignity of a report. If it were a make-shift and showed on its face a fraudulent mala fides attempt to comply with the statute, no court would consider such a document a report; but if, on the other hand, it did contain substantially all, measureably all, of the information required, from which a court of justice, acting through the conscience of the Chancellor, would be impressed with the idea that here is a carrier who has made every effort to comply with the law, and placed before the Commission, within the time required, a document which does rise to the dignity of a report, then we contend that such a carrier has fully complied with the law and is not amenable to the forfeiture and penalties provided, even though there has been found to be omitted from the report, as filed, a fact or figure necessary to its absolute completeness. For example, suppose in filing the annual report required by Section 20 of the Act to Regulate Commerce, in giving the number of stockholders an error was found; or in placing the cost and value of the property and the salaries were inaccurately stated, would the Interstate Commerce Commission contend that such annual report was no report,

and, therefore, a penalty should be assessed. Suppose, again the Commission had propounded a question to which they required specific answer, and the carrier in its attempt to comply, should make an answer by it deemed specific, but which, in the opinion of the Commission, was not specific, would this be deemed no answer, and would the remedy be the assessment of these penalties? Obviously not. It would be grossly unjust to so penalize. Suppose, therefore, in filing a periodical report of the instance of excessive service, there is omitted an item or two not sufficient, however, to destroy the integrity and substantiality of the report, why should it be contended that the carrier should suffer the same penalty as if no report whatever was filed, and as if plaintiff in error had taken the same position as the one hundred and fifty-three carriers did prior to the decision in the case of *Baltimore & Ohio Ry. Co. vs. I. C. C.*, 221 U. S. 612.

It is the province of the legislative department to prescribe punishment for acts, and it is no part of the power or province of a court to impose a punishment not prescribed by the legislature.

U. S. v. Wiltberger, 5 Wheaton, 76, 96.

It has always been the rule, suggested Mr. Justice Marshall in substance, that penal laws are to be construed strictly, and this principle is as old as construction itself; it is founded on the tenderness of the law for the rights of individuals and on the plain principle that the power of punishment is not vested in the courts.

The amendment of June 18, 1910, created and penalized a new offense, viz.: the failure of a carrier to

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file its monthly or periodical report of instances of excessive service of its employees within the time fixed by the Commission. This being true, the persons and acts denounced must be stated clearly and thoroughly prescribed, and

“An act which was not an offense by the express will of the legislative body before it was done, may not be justly or lawfully made so by construction after it is committed, either by the introduction into the statute of declarations or the expunging therefrom of words or terms by the judiciary.”

Nor. Pac. Ry. Co. v. U. S., 213 Fed. 162, 167.

Toulmin, District Judge, in the case of United States vs. Four Hundred Twenty Dollars, 162 Federal Reporter 803, 805, quoting from a decision of the Supreme Court of the United States, said:

“The province of construction lies wholly within the domain of ambiguity.”

The learned judge then quoted the words of Mr. Chief Justice Marshall in the Wiltberger case, saying:

“The intention of the Legislature is to be calculated from the words they employ. Where there is no ambiguity in the words, there is no room for construction.”

The learned District Judge was considering a provision of the Emigration Act, where the master of a vessel is required to report to the Collector of Customs further information respecting all aliens on board, and this report was to be under oath, and said:

“We may well infer that it was because it was considered that the verification of the lists by the signature and oath of the master would be a sufficient assurance that said lists would speak the truth. . . . The violation of this oath by the master in stating matters of information in the lists which he knew to be incorrect

and untrue, or which he did not believe to be true, might subject him to severer punishment than the imposition of the penalty provided by the act under consideration, and it seems to me would be a greater assurance, if assurance were necessary, that the information furnished was correct and true in every respect, or believed to be so."

So, also in the case at bar, Congress authorized the Commission to require these reports to be made under oath. It failed to penalize the omission to furnish an item or an instance called for by the Commission, and it may well be said that Congress believed the oath to be a greater assurance than the penalties prescribed, and in view of the fact that the power to require the report in the first instance was the cause of the legislation, it is easily understood therefrom that it is the failure to file a report which is penalized, and that the completeness of the report as filed is to be secured and assured by attaching thereto an oath of the carrier's officials.

If, therefore, the statute is to be strictly construed in the first place, and that a statute which creates a new offense and prescribes its punishment, must state clearly the acts denounced, and also that the natural, apparent meaning of the terms of a statute should always be preferred to any recondite signification, discovered only by study, ingenuity and strong desire, it would seem to be a straining of the language, a giving it an unusual and unnatural meaning to make it mean that a penalty is imposed not only for failing,

(1) To file a periodical report, or a specific answer or an annual report; but also to make it include;

(2) The omission to state in a report duly filed, some item, fact or instance which the Commission be-

lieved necessary to the conduct of their official duties, and which was, as compared to the whole amount of information demanded, wholly insignificant and absolutely unimportant, or which had been omitted through inadvertence or unintentional mistake.

In the case of *Bonnell v. Griswold*, 80 N. Y. 128, the Court of Appeals of the State of New York, had occasion to construe a statute out of which questions analogous to the instant case were considered. By a statute of New York, corporations were required to make an annual report within a time limit, which shall state the amount of capital, the proportion actually paid in and the existing debts. The report was required to be signed by the president and a majority of its trustees, and verified by the oath of the president and secretary. A penalty was attached to the statute to the following effect:

“If any of said companies shall fail so to do, all of the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made.”

In construing this statute, the Court found that a report had been in fact filed; that it complied with the statute, but was false in a material particular; it was argued that a false report was no report, and did not meet the demands of the statute. The court held the defendant in the case could not be liable for the company's debts, because it was not so declared by the statute, saying:

“The statutory liability imposed . . . does not attach if a report is made in terms complying with the statute, *although some of the representations be untrue.*”

To the same effect, see

Pier v. Handmere, 86 N. Y. 95.

Matthews v. Patterson, 26 Pac. (Col.) 812.

The case of

Northern Pacific Railway Company v. United States, 213 Federal 162

was a decision by the Circuit Court of Appeals for the Eighth Circuit, participated in by Circuit Judges Sanborn and Hook and District Judge Pope, and the opinion was unanimous. There was a prosecution of the Northern Pacific Railway Company for a failure to include in its reports, actually made, specific cases of excessive service of railroad employees. It appeared that in the month of October, 1911, an engineer, fireman, conductor and two brakemen had rendered over-service. The company had been sued by the United States for the penalty prescribed by the Hours of Service Act; recovered a judgment and the judgment was paid. On November 29, 1911, or within the time prescribed by the Commission's order, the Railroad Company filed its monthly report under oath, of instances of hours of service of its employees on duty during October for longer periods than those named in the Hours of Service Act, in the forms and in accordance with the regulations of the Interstate Commerce Commission, and many such instances were disclosed therein. The report was intended to be complete and to embrace any and all instances where its employees were kept in service longer during the month of October than the times limited by the Act of Congress, but it did not specify the instances of excessive service upon which the action was founded. The court found as a fact, that the omission was unin-

tentional, and a single instance only was omitted, and the question arose, therefore, whether or not such an omission from a report actually filed was a failure to file the periodical report required by law, which renders the company liable to the penalty of One Hundred Dollars for each successive day after the expiration of thirty days, within which the report is required to be filed.

Circuit Judge Sanborn speaking for the entire court of appeals, said (p. 165):

“The court below answered this question in the affirmative, and in support of that conclusion counsel for the government contend that the mistake of the company here was a mistake of law, and not of fact, and for the purposes of this discussion and decision this contention may be admitted to be sound. They argue that the order of the Commission required a monthly report of *all instances* of excessive service, that the filing of the report of all instances *but one* was a failure to file a report of all instances, and therefore a failure to file the periodical report which created a liability to the penalties prescribed by the act. But it is not true that a carrier that in good faith files an incorrect or incomplete periodical report, under oath, in due time, has failed to file any such periodical report. If it were, such a carrier would be liable to penalties for each of the instances of excessive service specified in such a filed report as much as for those omitted, and such a result is too intolerable and oppressive to be seriously contemplated.”

The Court's opinion in this case, has been the basis of much of the argument made in this brief, and in speaking of the last clause of Section 20 of the Act to Regulate Commerce, under which this action is brought, made the following very pertinent, clear and sound observation:

“Congress might have modified this clause, which describes and limits the offense, to-wit: ‘If any such carrier shall fail to make and file any such periodical or special report within the time fixed by the Commission, it shall be subject to the forfeitures last above provided,’ so that it would have read: ‘And if any such carrier shall fail to make and file such periodical or special report within the time fixed by the Commission, *or shall omit to specify in any such report it files any instance of excessive service required to be reported therein*, it shall be subject to the forfeitures last above provided.’ But it did not do so, the legal presumption is that it did not intend to do so, and it is not the province of the judiciary thus to amend the statute and by such amendment to create and punish another class of offenses.”

And upon the whole case, the Circuit Court of Appeals for the Eighth Circuit, speaking through the learned Circuit Judge, said:

“And the conclusion is that an omission by a carrier from the periodical report of the instances of excessive service of its employees made and filed in good faith within the time prescribed therefor by the Interstate Commerce Commission under the amendment of Section 20 of the act to regulate commerce (36 Stat. 556), of one or more instances of that which should have been included therein, or any mistake of law or fact therein made in good faith, does not subject the carrier to liability for the penalties or forfeitures denounced by that amendment for the failure to file a periodical report.”

It may be suggested here that the element of good faith, mistake or inadvertence is not in this case; but we contend that the presumption of law is that our acts, in attempting to comply with these statutes and orders, are each and all done in good faith, and that whatever omission is made from said report which does not diminish its substance or take from it the dignity

of a report, must be deemed to have been made inadvertently and without any desire or intention to violate the law or the orders of this Commission. And even should it not be so held, quoting from the opinion of Circuit Judge Sanborn:

“Reason and authority alike teach that the act of omitting from a periodical report filed in good faith an instance or item which should have been included therein . . . is not the offense of failing to file such periodical report.”

Citing a number of very important authorities.

Nevertheless, District Judge Rudkin was of the opinion and so stated (Folio 14) :

“The carrier actually . . . made reports . . . for the very months during which the delinquencies complained of occurred, but the number of excessive hours of service of the employee in question were omitted therefrom by inadvertence or mistake.”

Therefore, in either event whether the situation be accounted for by inadvertence or mistake, or whether we stand upon the proposition that the act of omitting an instance or an item from a filed report, is not the offense of failure to file; the result, so far as the plaintiff in error is concerned, is the same and justifies a reversal of this judgment.

The consequences of any other construction are so oppressive, so intolerable and unjust as to render it impossible for any court to believe Congress intended such a construction.

In the case at bar, operator Bishop rendered over-service during the month of March, 1913. The periodical report for that month was made April 21, 1913. The first day of default is claimed on May 1, 1913. The complaint was filed August 4, 1913; thus disclosing

one hundred and twenty-five days of default prior to the filing of the action, and by delaying the action for one year, three hundred and sixty-five days of default would occur; or in other words, there was actually \$12,500 of penalties accrued prior to the filing of the action, or by delay the Commission could secure penalties of \$36,500, and all this because a single instance was omitted from a very voluminous and otherwise accurately filed report. Again, if a single instance omitted justifies a penalty, then two instances would justify two penalties, and three instances, three penalties. In other words, if the construction claimed by the Government is correct, that a separate report must be made for each employee or be subjected to a penalty, then it would follow that, depending upon the circumstances and the caprice of the Commission, the penalties of One Hundred Dollars a day could be increased to two hundred and three hundred dollars per day, depending upon the number of instances omitted. Take the case of a train crew. The Court knows that the ordinary train crew consists of not less than five men, and where there is an instance of over-service of one member of a crew, there are also five instances. Would it be contended that the failure to mention the instance of this train crew rendering over-service would subject the carrier to the penalty of Five Hundred Dollars per day? This construction would lead to such preposterous absurdity and such unheard of oppression as to convince at once that Congress intended no such results.

Moreover, in the case at bar, what law exists which, if one hundred and fifty-five successive days of default exists, up to September 2d, 1913, and a pen-

alty of One hundred dollars a day is to be assessed, aggregating \$15,500, justifies the Commission in placing a construction thereon which would recover only for fifteen days of default; namely, from May 1st to May 17th, both dates inclusive and intervening Sundays excepted; what law exists which authorizes them to exclude Sundays from their respective causes of action. The answer is, there is no law except the whim of the Commission which is exercised by a clerk in the department of safety of the Interstate Commerce Commission. Can it be possible in this country of ours which prideth itself on being a government of law, that the American railroads must be subjected, not to a rule of law, but to the mere caprice or whim or desire of some clerk in the office of the Interstate Commerce Commission? Perhaps it was the oppressive character of the results of such construction contended for by the Government which prevented in this action the Government claiming penalties in the sum of \$12,500 and reducing the claim to \$1500. It will not be contended that the results of such construction would affect all carriers alike, and it certainly has not, and it certainly will not in the future. A carrier that happens to cross the course of the employee of the Interstate Commerce Commission and obtains his ill-will could be subjected to sufficient penalties as to seriously harrass its performance of its public duties as a carrier. On the other hand, a more fortunate carrier would be subjected to a lesser penalty. Take, for example the plaintiff in error in this case is now being subjected to penalties aggregating \$6000.00; Three thousand dollars in the case at bar, and three thousand dollars in another similar

case pending in this court bearing serial No. 2490, and the possibilities in the assessment of the penalties in the two cases will aggregate Fifty Thousand Dollars if the construction contended for by the government is true. In other words, the situation is so harsh, so unjust, so oppressive and so erroneous as to be properly characterized only as like vultures soaring around and finally alighting on the carcasses of the fast expiring American railroad systems. It was even beyond the conscience of the Commerce Commission acting through its safety department to make such extravagant claims, and so the action is only for thirty penalties. The action in the Northern Pacific case, 213 Fed. 162, was for five penalties. Why has the Northern Pacific Railroad Company been sued for five penalties and the Oregon-Washington Railroad & Navigation Company for sixty penalties in two actions? The whole merely illustrates the manifest error in placing a construction of that kind upon the statute and the order in question.

It has been held that the statute with respect to the penalties, by its terms, is mandatory, and that the court cannot consider any matter in mitigation as ground for the reduction of the penalties.

U. S. v. Yazo & M. Ry. Co., 203 Fed. 169.

Therefore, by the mere omission of a single instance in the periodical report, by the failure to be as specific in answers to an authorized question, as the Commission might deem it should be, or by the misstatement in the value, or the costs, or the dividends or the number of employees in the annual report, the carrier would be exposed to penalties aggregating many thousands of dollars. The leniency of the Government in claiming less

than that to which it is legally entitled, cannot affect the true interpretation of the statute.

To affirm this case and sustain this judgment is to inevitably vest in some Government official the power to determine in advance the measure of punishment to be meted out to a defaulting carrier, with the result that with respect to the same state of facts one carrier is sued for five days' default, another carrier for thirty days' default and another carrier for sixty days' default, depending not upon the certainty and stability of the law, but upon the will of some government official, thereby invading the province of the legislature to determine the quantum of punishment for a given act. It is not strange, therefore, that the Government hesitates to seek enforcement of such a law to its full extent, if their theory be correct, and the very injustice and oppressive character of the results of those views tend strongly to establish the contention of the plaintiff in error.

If the language will bear any other construction than that contended for by the Government, and a construction of which will relieve oppression, abolish favoritism and render the law certain, it is respectfully submitted that it should be adopted.

The conclusion must be, that the plaintiff in error has not violated Section 20 of the Act to Regulate Commerce, and has not offended against its penalty provisions.

This conclusion is in harmony with the natural and ordinary meaning of the statute and is not oppressive, nor harsh, nor unjust. It is a conclusion which may be adopted with a feeling that the law has not been made

an instrument of torture, but remedial in its nature.

Such a conclusion is earnestly prayed for in this action.

II.

The plaintiff in error contended in the lower court that it was unjust for the Government to claim a conviction for the violation of the order of June 28, 1911, for the reason that when the order was promulgated and served upon Mr. Charles H. Bates, our agent and attorney in Washington, D. C., whom we had designated as the person in that state upon whom service of orders and process could be made, no forms, such as the order required to be used, were served with it; and, therefore, the Government's case was incomplete. It would not only be unjust but immoral to prosecute for enormous penalties and forfeitures the violation of an order, when the Interstate Commerce Commission had failed and neglected to do, keep and perform one of the important conditions and requirements of the order which it had promulgated.

It was not disputed that where the order of June 28, 1911, referred to "Accompanying forms entitled 'Interstate Commerce Commission Hours of Service Reports,'" that there were no forms accompanying the service of the order, and there is no evidence that the forms were served at all. To meet this contention two propositions were urged:

First: On cross examination of Mr. Bates (Folio 22) he was required to testify that he did receive from the Interstate Commerce Commission a copy of an order, dated April 8, 1912, entitled "In the matter of alteration in the method and form of monthly reports of the Hours

of Service of employees on railroads, subject to the act of March 4, 1907," and also with said order did receive certain forms, Numbers 1 to 8 inclusive, entitled "Interstate Commerce Commission hours of service reports." It seems clear, therefore, that the method and form of making these monthly reports had been altered. The order itself so states, and if the Court takes judicial knowledge of the actions of the Interstate Commerce Commission, it must know that the order of June 28, 1911, was materially modified and in many respects abolished.

The Government offered in evidence certified copies of the Hours of Service Report of the carrier, showing hours of excess labor during the months of March and May, 1913. This exhibit will be brought up for this Court's inspection, under authority of Section 4 of Rule 14 of the Court of Appeals. An inspection of this exhibit will show the forms to be those provided by the order of April 8, 1912, notwithstanding the concessions the carrier's trial attorneys made to the Government, as shown by the Bill of Exceptions (folio 19).

Secondly, the next contention of the Government is that it was conceded by the plaintiff in error that the reports filed with the Interstate Commerce Commission by the plaintiff in error, herein, were identical forms of reports required to be used and filed by carriers under the order of the Interstate Commerce Commission of June 28, 1911 (folio 19). The lower court held that inasmuch as the carrier had received the forms by some other means that they could not be heard to say that they were not served upon Mr. Bates. It is difficult to understand why the Government relies upon this conces-

sion, when they knew that the order of June 28, 1911 was modified, altered and materially changed by the order of April 8, 1912.

Mr. Otis B. Kent, Special Assistant United States Attorney who tried this case in the court below, also cross-examined Mr. Charles H. Bates (folio 22), in which he expressly interrogated Mr. Bates concerning the receipt of the order of April 8, 1912.

Now, the Government's contention creates a serious dilemma. It is a double-headed dilemma. If the reports made by the carrier, certified copies of which were offered in evidence, were identical with the forms of reports adopted by the order of June 28, 1911, then we say the Government cannot claim a conviction because this feature of the order has been abolished by the order of April 8, 1912. On the other hand, if these forms of reports which were actually used by the carrier are in fact, notwithstanding the concessions, identical with those required by the order of April 8, 1912, then we say that the Government has not plead the provisions of the order of April 8, 1912, and consequently its violation cannot be claimed. In either event, the Government's case must fail for the very simple reason that the complaint fails to state the entire case, when it omits all reference to the order of April 8, 1912, and the exhibits in question, consisting of voluminous instances of over-service, brought together into one single report can serve no purpose in establishing liability of the carrier to the Government, but are exceedingly useful and absolutely conclusive in showing the carrier to have actually filed a report in accordance with the various orders of the Commission now in force.

We, therefore, respectfully submit that the judgment of the court below should be reversed, with directions to enter an order dismissing the complaint.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

No. 2471.

**United States Circuit Court of Appeals
for the Ninth Circuit.**

OREGON-WASHINGTON RAILROAD AND NAVIGATION
COMPANY, A CORPORATION, PLAINTIFF IN ERROR,

v.

THE UNITED STATES OF AMERICA, DEFENDANT IN
ERROR.

UPON WRIT OF ERROR IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Additional
BRIEF OF DEFENDANT IN ERROR.

FRANCIS A. GARRECHT,
United States Attorney.

PHILIP J. DOHERTY,
Special Assistant United States Attorney.

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United States Circuit Court of Appeals for the Ninth Circuit.

OREGON - WASHINGTON RAILROAD AND Navigation Company, a corporation, plaintiff in error, <i>v.</i> THE UNITED STATES OF AMERICA, DE- fendant in error.	}	No. 2471.
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*ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WASHINGTON.*

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

QUESTIONS INVOLVED.

I. Was the failure of this carrier to report the instances of excess service in question a violation of section 20 of the act to regulate commerce for which the United States can recover \$100 a day?

II. Does the deposition in the record establish that no forms were served upon the carrier; and if so, does the fact that no service of forms was made establish a defense?

ARGUMENT.

I.

The order with which the carrier is charged with noncompliance and upon which this action is based is set forth in the plaintiff's declaration. For convenience it may be here repeated: "It is ordered that all carriers subject to the provisions of the act entitled 'An act to promote the safety of employees

and travelers upon railroads by limiting the hours of service of employees thereon,' approved March 4, 1907, report within 30 days after the end of each month, under oath, all instances where employees subject to said act have been on duty for a longer period than that provided in said act."

This order would be fulfilled either by a single report containing all instances of excessive service or by a separate report for each such instance. It is not complied with, however, by a report containing all instances but one. In short, the thing required by the Commission is certain information and not merely a compliance with a certain monthly formality.

It follows that the carrier was in default with respect to its failure to make the report required by the Commission within the time fixed, and therefore incurred the penalty of \$100 a day for such default provided by section 20.

Such has been the construction heretofore tacitly given to the section by the District Court in a suit by the United States to recover a penalty for a similar default. (*United States v. Chicago, M. & P. S. Ry. Co.* (D. C. Wash.) 195 Fed., 783. See also, *United States v. Yazoo & M. V. R. Co.* (D. C. W. D. Tenn.) 203 Fed., 159.)

While we have found no direct authority upon the question here presented, analogies are not wanting. In *Phile v. Anna*, (1 Dall., 197, 205) under a statute providing that "every vessel or boat from which any goods, wares, or merchandise shall be

unladen, before due entry thereof at the office of the collector of the port * * * shall be forfeited," and that "the master of any ship or vessel shall exhibit to the collector a true manifest of the goods, wares, and merchandise imported in such ship or vessel, and swear that there are no other on board, to the best of his knowledge and belief," it was held that the offense involving forfeiture of the vessel was committed by the delivery of a false manifest. The court said (p. 205):

* * * If the master is obliged by law to deliver in a manifest, he does not comply, unless he exhibits a true and accurate one; and his committing perjury upon the occasion, so far from saving the vessel, must greatly increase the offense.

Again, in *134,901 Feet of Pine Lumber* (4 Blatch., 182), under a similar statute, it was held that it was immaterial whether the master of the vessel presented a false manifest or none at all. See also *Ellis v. Hartley* (1901), 27 Vict. L. R., 31.

The Circuit Court of Appeals in the case of *United States v. Northern Pacific Railway Company* (213 Fed., 162) relied largely on the hardship which would ensue as a consequence of the construction of section 20 for which we contend. But that is obviously a question for the consideration of Congress, and should not weigh against the clear language of the section. That language does not seem to us open to the construction placed upon it by the Circuit Court of Appeals. For the purpose

of the section, a failure to report any instance of excessive service is a failure to make a report required by the Commission; and it is immaterial whether or not that failure takes the form of an omission from a monthly report. Under any other interpretation, the statute inevitably gives the carrier a free hand in concealing violations of the hours of service act, without any recourse for the Government except punishment of the officer who verifies the report under oath on the charge of perjury in case knowledge on his part of its falsity can be shown. We submit that Congress did not intend thus to nullify the investigatory power of the Commission under section 20, or that the Commission in requiring such reports is doing a vain thing.

The validity of the order of the Interstate Commerce Commission was affirmed by the Supreme Court *in its application to the obligation of the carrier to report all specific instances of infraction of the hours of service law.*

The bill of the plaintiff in the Baltimore & Ohio case contained inter alia these allegations:

The sheets to be annexed to the report above mentioned comprise five different forms, designated Form A to Form E, both inclusive, and upon these sheets the carrier making the report is required to show in detail the name, post-office address, and occupation of *each employee* who was either on duty for a period of time in excess of that contemplated by the act or who had

not been off duty after any period of service for the length of time prescribed by the act, and in the case of *every such employee* the carrier was required to state the cause of and the facts, if any, explanatory of the excess service thus rendered by the employee.

* * *

If, therefore, the said order be permitted to stand and your orator be required to make the report called for herein, it will, in the event of *any infraction* of the act by its officers or agents, be obliged to furnish under oath information of *such infraction* or violation, and will, consequently, be required not only to disclose actions of its officers or agents which will subject them to the penalties prescribed by the act, but will also subject it to like penalties because of the provision contained in the act that in all prosecutions thereunder the carrier shall be deemed to have had full knowledge of all acts of all its officers and agents. * * *

The said order necessarily contemplates and requires that infractions of the law which may occur—and it is inevitable that through *oversight, inadvertence, or mistake* such infractions will occur—shall be made the subject of report to your orator by the officers concerned in or responsible for such infractions, which said reports will become part of the records of your orator, and as such will be open to the inspection of the said Interstate Commerce Commission * * *.

The opinion by Mr. Justice Hughes begins:

This is a bill in equity to annul an order made by the Interstate Commerce Commis-

sion on March 3, 1908, and for injunction. The order required the carriers within the provisions of the act of Congress of March 4, 1907 (ch. 2939, 34 Stat., 1415), to make monthly reports under oath *showing the instances* where employees subject to that act had been on duty for a longer period than that allowed. [Our italics.]

Further on in the course of the opinion:

The bill alleges that in the original forms prescribed the carrier was required to show the employees who were “either on duty for a period in excess of that contemplated by the act or who had not been off duty after any period of service for the length of time prescribed by the act, and *in the case of every such employee* the carrier was required to state the cause of and the facts, if any, explanatory of the excess service thus rendered by the employee.” [Our italics.]

The Supreme Court in *Baltimore & Ohio v. Interstate Commerce Commission* therefore decided that the order of the Interstate Commerce Commission in question here is valid. This holding also involves the conclusion that the order is obligatory upon the carriers to the same extent as if it were a congressional enactment. The importance of this holding in its application to the case at bar is emphasized by the expressions “*specific instances*,” “*full information*” in the opinion and by the fact that the record shows that the attention of the court was called to the requirement that “individual instances” of excess service should be reported.

And therefore it is fairly deducible from the decision in the case of *Baltimore & Ohio Railroad v. Interstate Commerce Commission* that the requirement of a report of each case of service in excess of the statutory period is obligatory upon carriers.

Is the obligation of the carrier fulfilled by any form of report which does not set forth "all instances"?

The letter of the order is not complied with if less than all instances are reported. No instance is negligible when, as in the omitted instance in the case at bar, it is *in itself* a violation of a statute. It can not be presumed that violations of any law are of such volume and frequency as to make unimportant the omission of specific instances from a required governmental report. A report which does not comply with the terms of the order is not a report which complies with the law.

If a report which does not comply with the terms of the order requiring it, in that it omits one instance of law violation, is still a report, where can the line be drawn as to the number of omissions of law violation which will make such defective compliance a violation of the obligation to report?

The obligation to file reports covers a large field of governmental regulation:

Eagle Insurance Co. v. Ohio (153 U. S., 446).

Mayor of City of New York v. Miln (11 Pet., 102).

St. Joseph v. Levin (128 Mo., 588).

Commonwealth v. Tenth Mass. Turnpike Co. (11 Cush., 171).

People v. Buffalo Stone & Cement Co. (15 L. R. A., 240).

Attorney-General v. Petersburg, etc., R. Co. (28 N. C., 456).

Louisville, etc., Ferry Co. case (104 Ky., 726).

Bank of Saginaw v. Pierson (112 Mich., 410).

Henderson Bridge Co. v. Commission (99 Ky., 623).

Eyre v. Harmon et al. (192 Cal., 580).

People v. C. I. & L. Ry. Co. (223 Ill., 581).

In many of the foregoing cases the charter of the corporation has been forfeited by failure to make a required report.

One of the Kentucky cases just cited was as to the validity of a requirement of a report from pawnbrokers. (*St. Joseph v. Levin.*) Of what value would a report from pawnbrokers be if particular instances of the receipt of goods possibly stolen could be omitted without impairing the validity of such a report?

But here there is a distinction which is gravely important between the case at bar and all the other reported cases, including the cases cited by the plaintiff in error. And this distinction is to be emphasized.

The instances here required to be reported are each a possible violation of law, they are each cases of employment in excess of the period fixed by law,

and unless excused by the specific exceptions in the act each instance is in itself a violation of a law enacted in the interest of the safety of employees and the traveling public.

Unless excused under the proviso the excess service of *each* employee is a statutory violation. (*Missouri, Kansas & Texas R. R. Company v. United States*, 231 U. S., 112.)

Where an enumeration and specification of “*all instances*” of the possible violation of a statute are required of a corporation in a report, the omission of one or several of its violations of law from a document purporting to be its report, such document can not be accepted as a compliance with a valid obligation to report all instances. The omission of one of the vital elements of a report lawfully required, affects, impairs, and destroys its validity.

The integrity of the whole system of reports upon this subject would be impaired if there is any looseness admitted into the system by which errors, mistakes, and omissions are judicially declared to be negligible.

In *Northern Pacific Ry. Co. v. United States* (213 Fed., 162, Eighth Circuit Court of Appeals) the court suggests that if Congress had intended to give this act the construction contended for by the Government it might have modified the clause which describes and limits the offense, but as it did not do so, the act can not be so construed that words

may be introduced therein or expunged therefrom by the courts to give it the meaning contended for.

But does not the opinion of that court necessarily read into the obligation of the carrier to report “*all instances*” an exception which covers without very definite limits one *or more* “omissions in good faith,” “omissions resulting from incorrect information,” “unintentional mistakes or omissions,” “an honest error of law or mistake of fact,” and instead of a report of all instances permit “the filing in good faith of an *incomplete* or *incorrect report*”?

The obligation of the statute and the order lawfully issued thereunder requires a *complete* report to furnish “full information” (*Baltimore & Ohio v. United States*) to the Commission.

Under the rule *invoked* by Judge Sanborn there is no authority which can authorize the limitation, qualification, or exception which his opinion applies to the general words of the obligation of carriers.

Statutes of this character are not affected by questions of good faith, honest intent, or mistakes of fact or law on the part of those to whom they apply. (*Chicago, Burlington & Quincy Railway Co. v. United States*, 220 U. S., 559; *Armour Packing Company v. United States*, 209 U. S., 56, 85.)

This is not a criminal case. It is a civil action in the nature of the action for debt to recover penalties which Congress in its wisdom saw fit to impose upon railroads to secure compliance with certain

specified regulations. Ignorance of the law does not excuse. A lack of wrongful intent does not excuse. Any mistake of fact does not excuse.

The duty of compliance is absolute.

A report which for any of the foregoing reasons is incomplete is not a compliance with the law. The legal obligation is only satisfied by a complete report. Any part less than the whole is not equal to the whole.

The incompleteness in any material respect of a report may well be held to deprive such a document of its status as a report. And the omission of one or more law violations may properly be held to be a material omission.

No such omission can be held to be of such immateriality as to be inconsequential in the determination of the question whether or not it is or is not a report.

When the Supreme Court has said that a requirement of a report of *all* instances is valid *where does any other court get the authority to say that a report of a less number than all instances is a compliance with this requirement?*

The interpretation contended for by the Government is the generally accepted interpretation of this statute as shown by the judgment of the District Courts of the United States in the following cases in many of which the railroads by confessions of judgment accepted the interpretation of the prosecution.

Penalties have been imposed by the courts for SEVEN HUNDRED AND SIXTY-ONE VIOLATIONS, as follows:

Penalties imposed for failure to file reports.

Court.	Railroad.	Judgment.
Eastern district of Arkansas.....	Chicago, R. I. & P.....	\$500
Do.....	Mo. & North Ark.....	200
Western district of Arkansas.....	Chicago, R. I. & P.....	100
District of Idaho.....	Oregon Short Line.....	3,000
Northern district of Illinois.....	Illinois Central.....	300
Do.....	do.....	3,000
Do.....	Chicago & Alton.....	2,000
Do.....	C. M. & St. P.....	1,000
Do.....	Chicago & E. Ill.....	1,500
Southern district of Illinois.....	Wabash.....	1,000
District of Indiana.....	Chicago, I. & L.....	500
Southern district of Iowa.....	C. M. & St. P.....	200
Eastern district of Kentucky.....	Chesapeake & Ohio.....	1,000
Western district of Louisiana.....	Kansas City Southern.....	1,000
District of Maine.....	Canadian Pacific.....	500
Do.....	Bangor & Aroostook.....	3,000
Eastern district of Michigan.....	Grand Trunk Western.....	3,000
Do.....	Pere Marquette.....	3,000
District of Minnesota.....	Northern Pacific.....	200
Do.....	C. M. & St. P.....	500
Do.....	M. St. P. & S. S. M.....	3,000
Northern district of Mississippi.....	Yazoo & Miss. Val.....	200
Southern district of Mississippi.....	Illinois Central.....	1,000
Eastern district of Missouri.....	Wabash.....	1,000
Do.....	Illinois Southern.....	1,500
Western district of Missouri.....	St. L. & S. F.....	1,000
District of Montana.....	Northern Pacific.....	1,000
District of Nebraska.....	Chicago, B. & Q.....	300
District of New Mexico.....	Colorado & Southern.....	3,000
District of North Dakota.....	Great Northern.....	1,000
Northern district of Ohio.....	Baltimore & Ohio.....	3,100
Southern district of Ohio.....	Kanawha & Michigan.....	3,000
Do.....	Detroit, Toledo & I.....	3,000
Western district of Oklahoma.....	Chicago, R. I. & P.....	500
Do.....	Midland Valley.....	3,000
Do.....	Mo., Kansas & Texas.....	3,000
District of South Dakota.....	C. M. & St. P.....	200
Do.....	do.....	2,400
Western district of Tennessee.....	Illinois Central.....	500
Do.....	Yazoo & Miss. Val.....	400
Eastern district of Texas.....	M. K. & T. of T.....	3,000
Do.....	Houston & Texas Central.....	3,000
Western district of Texas.....	Texas Central.....	3,000
Do.....	G. H. & S. A.....	3,000
District of Vermont.....	Central Vermont.....	3,000
Western district of Washington.....	C. M. & P. S.....	500
Eastern district of Wisconsin.....	C. M. & St. P.....	1,000
District of Wyoming.....	Union Pacific.....	2,000
Total.....		76,100

An interpretation of an act which has been so “widely accepted and acted upon by the courts” ought not to be now disturbed. “A contrary course would cause infinite uncertainty, if not mischief, in the administration of the law in the Federal courts.” (Harlan, Justice, in *Chicago, Burlington & Quincy v. United States*, 220 U. S., 559.)

The subject matter of such a report is “all instances” of excess service. *If* there are reports called for by governmental authority as to which by the very nature of the subject matter there is not the practicability of obtaining absolute accuracy in reports to official authority, this can not in any manner affect reports called for upon a subject matter which is fully apparent from records required to be kept by the carrier and all that is necessary to secure the full report of all instances is the ability to make a correct and complete transcription from these records.

how [^] The impracticability of the suggestion of the opinion in the *Northern Pacific case* to the possibility of collection of unjust and oppressive amounts as penalties, if the Government’s contention is correct as to the interpretation of this statute, attention need be called only to the proposition that if failure to file one omitted case of excess service in a monthly report was a failure to file a report then there was a possibility of penalties for failure to file as ^{to} each of the cases of excess service which were reported.

No one who has given a moment's consideration to the statute would for a moment contend that there was any more than one penalty for each day's failure to file a complete report.

But if the act *is* susceptible of a construction permitting the large penalties suggested in that opinion, there is a complete answer to the contention of possible injustice and oppression. It is this:
 " THE RAILROADS HAVE ALREADY AN EFFICIENT WAY OF AVOIDING THESE SEVERE PENALTIES, NAMELY, BY OBEYING TRULY THE LAWS OF THE STATE (NATION). IF THEY DO THIS, THEY ARE IN NO DANGER OF THE PENALTY; IF THEY DO NOT, THEY ARE IN NO CONDITION TO COMPLAIN OF THE LAWS." (*B. C. & N. Ry. Co. v. Dey*, 82 Iowa, 312.)

The learned counsel for plaintiff in error argue as to the harshness and injustice of suits of this character for failure to file complete reports, calling only for money penalties from the corporation and seem to maintain and even urge that the much more stringent and harsh method be adopted of prosecutions of the railroad officials in the criminal courts for perjury.

There may be some practical difficulties in the latter course, but if it was pursued by the Government it would be likely to meet with even more strenuous criticism than is indulged in in plaintiff in error's brief.

When reports fail to comply with the legal obligation of the carrier as established by the Supreme Court such actions as the present are likely

to prove efficacious without forcing the Government to place any officials of the carrier in the criminal dock.

Counsel quote in their brief (p. 22) the suggestion of District Judge Toulmin that any violation of the oath of the master of a vessel "might subject him to *severer punishment* than the imposition of the penalty" in that case and "*would be a greater assurance*, if assurance were necessary, that the information furnished was correct and true in every respect, or believed to be true."

The "severer punishment" does not seem to be called for in cases of this character and the *greater assurance* of accuracy caused by the liability of a prosecution of an official for making a false oath is no assurance at all where negligent mistake in making official reports is all that can be claimed.

The law of perjury takes no cognizance of mere negligence in the preparation of a report. It looks only to wrongful intent. Lacking such intent a report may be loose and incomplete and prolific in errors and still the criminal law could not be set in motion.

The only practical compulsion to accuracy in governmental reports of this character is the penal action for failure to file a complete report.

AS TO THE ALLEGED NONSERVICE OF FORMS.

No statute made the service of the established forms a prerequisite to the effectiveness of the order of the Interstate Commerce Commission.

When that order was officially established it was of universal application to all railroads independent of the question of service.

Railroads are obliged to take notice of regulations which are of such a public nature that the courts take judicial notice of them without proof. (*Caha v. United States*, 152 U. S., 211, 221, 222.)

The provision in the order for service of the same upon carriers was directory and not mandatory.

As to this order it may be said, as Judge Cooley said of statutes, “ that particular provisions may be regarded as directory ; merely by which is meant that they are to be considered as giving directions which ought to be followed, but not so limiting the power in respect to which the directions are given that it can not be effectively exercised without observing them.” (Cooley on Constitutional Limitations, 74.)

Lord Mansfield said in *Rex v. Luxdale* (1 Burr., 447) that “ There is a known distinction between circumstances which are of the essence of a thing required to be done * * * and clauses merely directory.”

Moreover, the deposition in the record is not by itself sufficient to overcome the legal presumption of due performance of duty by those charged with the official direction in the order to make service upon the carriers.

“ The general experience that a rule of official duty or a requirement of legal conditions is fulfilled by those upon whom it is

incumbent has given rise occasionally to a presumption of due performance.” (4 Wigmore on Evidence, sec. 2534.)

That one of the representatives of this railroad did not receive the forms in question is not proof that no proper official received them.

The fact that the railroad has the forms and has been continuously using them ever since the order became operative is amply sufficient to sustain the presumption that the officials charged with the duty of serving the forms did so upon some authorized official of the railroad.

This action is not for noncompliance by the carrier with the obligation to use the established forms. The action in this case is for noncompliance with the order requiring monthly reports by the carriers of all instances where employees subject to said act have been on duty for periods longer than those provided in said act.

To make this matter clear, we have printed in the appendix copies of all the orders of the Interstate Commerce Commission upon this subject since the passage of the act of March 4, 1907.

The first order was that of March 3, 1908, and this was the order in effect at the time of the institution of the proceedings in the case of *Baltimore & Ohio* against *Interstate Commerce Commission* (221 U. S., 612).

Because of a contention made in the *Baltimore & Ohio* case that the order of the 3d of March, 1908, had been passed one day before the hours-

of-service law became operative, the Commission, on the 28th day of June, 1911, passed a second order which was identical in terms and obligation with the order of March 3, 1908, with the exception that it called for the first report for the month of July, 1911. It is for violation of the second order that this suit is brought.

There was, on the 8th of April, 1912, an order covering the *details of forms* to be used, but which *in no manner affected the terms and obligations* of the *previous* order of June 28, 1911.

The record in this case discloses that the forms prescribed by the Commission's order establishing forms on the 8th of April, 1912, were served upon the carrier in this case and that it received at the time forms which are the identical forms in use and required to be used at the time of the violation in this case, but the *action* is brought for violation of the *order of June 28, 1911*, for failure to comply with *its* provision requiring carriers to "report within 30 days after the end of each month all instances where said employees, subject to said act, have been on duty for a longer period than that provided in said act."

Respectfully submitted.

FRANCIS A. GARRECHT,
United States Attorney.

PHILIP J. DOHERTY,
Special Assistant United States Attorney.

APPENDIX.

ORDERS OF THE INTERSTATE COMMERCE COMMISSION.

At the General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 3d day of March, A. D. 1908.

Present:

MARTIN A. KNAPP,	} Commissioners.
JUDSON C. CLEMENTS,	
CHARLES A. PROUTY,	
FRANCIS M. COCKRELL,	
FRANKLIN K. LANE,	
EDGAR E. CLARK,	
JAMES S. HARLAN,	

IN THE MATTER OF THE METHOD AND FORM OF MONTHLY REPORTS OF HOURS OF SERVICE OF EMPLOYEES ON RAILROADS SUBJECT TO THE ACT OF MARCH 4, 1907.

The method and form of monthly reports of hours of service of employees upon railroads subject to the act of March 4, 1907, having been considered by the Commission:

It is ordered, That all carriers subject to the provision of the act entitled “ An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon,” approved March 4, 1907, report within 30 days after the end of each month, under oath, all instances where employees subject to said act have been on duty for a longer period than that provided in said act.

It is further ordered, That the accompanying forms entitled “ Interstate Commerce Commission Hours of Service Report,” and the method embodied in the instructions therein set forth, be and the same are hereby adopted and prescribed; and all common carriers subject to said act are hereby notified to use and follow the said prescribed forms and method in making monthly reports of hours of service of employees on duty for a longer period than that named in said act, commencing with and making the first report for the month of April, 1908.

And it is further ordered, That copies of said forms, together with a copy of this order, be served by registered mail upon all common carriers subject to said act.

A true copy:

EDW. A. MOSELEY,
Secretary.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 28th day of June, A. D. 1911.

Present:

JUDSON C. CLEMENTS,	} Commissioners.
CHARLES A. PROUTY,	
FRANKLIN K. LANE,	
EDGAR E. CLARK,	
JAMES S. HARLAN,	
CHARLES C. McCHORD,	
BALTHASAR H. MEYER,	

IN THE MATTER OF THE METHOD AND FORM OF MONTHLY REPORTS OF HOURS OF SERVICE OF EMPLOYEES ON RAILROADS SUBJECT TO THE ACT OF MARCH 4, 1907.

The method and form of monthly reports of hours of service of employees upon railroads subject to the act of March 4, 1907, having been considered by the commission:

It is ordered, That all carriers subject to the provisions of the act entitled "An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, report within 30 days after the end of each month, under oath, all instances where employees subject to said act have been on duty for a longer period than that provided in said act.

It is further ordered, That the accompanying forms entitled "Interstate Commerce Commission Hours of Service Report," and the method embodied in the instructions therein set forth, be, and the same are hereby, adopted and prescribed;

and all common carriers subject to said act are hereby notified to use and follow the said prescribed forms and method in making monthly reports of hours of service of employees on duty for a longer period than that named in said act, commencing with and making the first report for the month of July, 1911.

And it is further ordered, That copies of said forms, together with a copy of this order, be forthwith served upon all common carriers subject to said act.

A true copy:

JUDSON C. CLEMENTS,
Chairman.

At the General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 8th day of April, A. D. 1912.

CHARLES A. PROUTY,	}	Commissioners.
JUDSON C. CLEMENTS,		
FRANKLIN K. LANE,		
EDGAR E. CLARK,		
JAMES S. HARLAN,		
CHARLES C. McCHORD,		
BALTHASAR H. MEYER,		

IN THE MATTER OF ALTERATION IN THE METHOD AND FORM OF MONTHLY REPORTS OF HOURS OF SERVICE OF EMPLOYEES ON RAILROADS SUBJECT TO THE ACT OF MARCH 4, 1907.

The matter of alteration in the method and form of monthly reports of hours of service of em-

ployees upon railroads subject to the act of March 4, 1907, being under consideration:

It is ordered, That the accompanying forms entitled "Interstate Commerce Commission Hours of Service Report," and designated as—

Form No. 1.—Oath and summary for use when there is excess service.

Form No. 8.—Oath for use when there is no excess service.

Form No. 2.—Employees on duty more than 16 consecutive hours.

Form No. 3.—Employees returned to duty after 16 hours continuous service, without 10 consecutive hours off duty.

Form No. 4.—Employees returned to duty, after aggregate service of 16 hours, without 8 consecutive hours off duty.

Form No. 5.—Employees continued on duty after aggregate service of 16 hours.

Form No. 6.—Employees at continuously operated day-and-night offices, who dispatch, report, transmit, receive, or deliver orders affecting train movements, and who were on duty more than 9 hours in any 24-hour period.

Form No. 7.—Employees at offices operated only during the daytime, or not to exceed 13 hours in a 24-hour period, who dispatch, report, transmit, receive, or deliver orders affecting train movements, and who are on duty for a longer period than 13 hours in any 24-hour period—

and the method embodied in the instructions therein set forth, be, and the same are hereby, adopted and prescribed; and all common carriers subject to said act are hereby notified to use and follow the said prescribed forms and method in making

monthly reports of hours of service of employees on duty for a longer period than that named in said act, commencing with and making the first report for the month of July, 1912.

And it is further ordered, That copies of said forms, together with a copy of this order, be forthwith served upon all common carriers subject to said act.

By the Commission.

[SEAL.]

JOHN H. MARBLE,
Secretary.

○

No. 2472

United States
Circuit Court of Appeals
For the Ninth Circuit.

SMITH-BOOTH-USHER COMPANY, a Corporation,

Plaintiff in Error,

vs.

DETROIT COPPER MINING COMPANY OF ARIZONA, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Arizona.

Filed

OCT 7 - 1914

F. D. Mendenhall,
Clerk.

No. 2472

United States
Circuit Court of Appeals

For the Ninth Circuit.

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Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Arizona.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States District Court for the District
of Arizona.*

No. 97.

SMITH-BOOTH-USHER COMPANY,
Plaintiff,

vs.

THE DETROIT COPPER MINING COMPANY
OF ARIZONA,
Defendant.

Summons.

Action Brought in the United States District Court
for the District of Arizona.

The President of the United States of America,
Greeting: To the Detroit Copper Mining Com-
pany of Arizona:

YOU ARE HEREBY SUMMONED and re-
quired to appear in an action brought against you by
the above-named plaintiff, in the United States Dis-
trict Court for the District of Arizona, and answer
the complaint therein filed with the clerk of this said
court, at Phoenix, in said District, within twenty
days after service upon you of this Summons, if
served in this said District, or in all other cases,
within thirty days thereafter, the time above men-
tioned being exclusive of the day of service, or judg-
ment by default will be taken against you.

Given under my hand and the seal of the United

States District Court for the District of Arizona, this 17th day of July, A. D. 1913.

[Seal of Court]

ALLAN B. JAYNES,

Clerk of Said District Court.

By (Signed) Frank E. McCrary,

Deputy.

UNITED STATES MARSHAL'S RETURN.

Received this writ July 18th, 1913, at Phoenix, Arizona, and executed the same July 22d, 1913, at Morenci, Arizona, upon the within named Detroit Copper Mining Company of Arizona, by delivering a true and certified copy hereof, to which was attached a copy of the complaint filed in this case, to A. T. Thompson, personally. The said A. T. Thompson at the time being the authorized statutory agent of the defendant corporation, the Detroit Copper Mining Company of Arizona.

This 22d day of July, 1913.

C. A. OVERLOCK,

U. S. Marshal.

By (Signed) G. A. Franz,

Deputy.

Marshal Fees for Service: \$4.00.

Expenses \$2.00,—total \$6.00. [2*]

[Endorsements]: No. 97. United States District Court, District of Arizona. Marshal's Docket No. 352. Smith-Booth-Usher Company vs. The Detroit Copper Mining Company. Summons. Filed July 25, 1913, at — M. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. [3]

*Page-number appearing at foot of page of original certified Record.

[Order Setting Cause for Trial.]

MINUTE ENTRY APPEARING UNDER DATE
OF DECEMBER 13, 1913.

No. 97.

SMITH-BOOTH-USHER CO.,

Plaintiff,

vs.

DETROIT COPPER MINING CO. OF ARI-
ZONA,

Defendant.

IT IS ORDERED that this case be set for trial on
January 13th, 1914, subject to agreement of counsel
for the defendant, they not being present in court.

[4]

[Order Resetting Cause for Trial, etc.]

MINUTE ENTRY APPEARING UNDER DATE
OF JANUARY 5, 1914.

No. 97.

SMITH-BOOTH-USHER CO.,

Plaintiff,

vs.

THE DETROIT COPPER MINING CO.

Defendant.

IT IS ORDERED that the order heretofore made
setting this case for trial on the 13th day of January,
1914, be vacated and set aside, and that the case be

reset for trial on January 19th, 1914, at ten o'clock
A. M. [5]

**[Order Resetting Cause for Trial on January 21,
1914.]**

MINUTE ENTRY APPEARING UNDER DATE
OF JANUARY 6, 1914.

No. 97.

SMITH-BOOTH-USHER CO.,

Plaintiff,

vs.

THE DETROIT COPPER MINING CO.,

Defendant.

IT IS ORDERED that the former order of this
Court, setting this case for trial on the 19th day of
January, A. D. 1914, be vacated and set aside, and
that the case be set for trial on January 21st, 1914,
at 9:30 o'clock A. M. [6]

*In the United States District Court for the District
of Arizona.*

SMITH-BOOTH-USHER COMPANY, a Corpora-
tion,

Plaintiff,

vs.

THE DETROIT COPPER MINING COMPANY
OF ARIZONA,

Defendant.

Amended Complaint.

Comes now the plaintiff in the above-entitled action and by his amended complaint herein complains and alleges:

FIRST CAUSE OF ACTION.

I.

That the plaintiff is now and has been at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of California and having its principal place of business in the city of Los Angeles, county of Los Angeles, State of California.

II.

That the plaintiff is informed and believes and upon such information and belief alleges that defendant is now and has at all times hereinafter mentioned been a corporation organized and existing under and by virtue of the laws of Michigan and duly qualified to carry on business in the State of Arizona.

III.

That on or about the 5th day of December, 1912, plaintiff, made, entered into and executed a certain agreement in writing as follows: [7]

Los Angeles, Calif., December 2nd, 1912.

SMITH-BOOTH-USHER COMPANY, furnish the undersigned:

Three (3) Two hundred (200) Horse Power,
International Amet. Crude Oil Gas
Producers; lined complete with
brick work and concrete, with all

Piping and Valves as shown in cut
on the first page of the Company's
Bulletin hereto attached;

With Scrubbers, Oil Pump, Plans
and Specifications for installation;

Shipment to be made by the Company in approxi-
mately forty-five (45) days from date of acceptance
of this agreement.

PRICE of the above machinery \$10,000.00

DELIVERY f. o. b. cars Morenci, Arizona.

In consideration of the above the Purchaser agrees
to pay you the sum of Ten Thousand (\$10,000)
Dollars, payable in the City of Los Angeles, upon the
following terms:

On completion of ninety (90) days trial, should the
apparatus meet the guarantees herein specified, or
any time prior to the end of the ninety (90) days
trial herein specified, should the Purchaser so elect.

The Purchaser agrees to pay interest at the rate
of six (6%) per cent per annum from date of erec-
tion until paid.

It is expressly agreed that the title to said prop-
erty shall not pass until the purchase price or any
judgment for the same is fully paid and shall remain
your property until that time whatever be the mode
of its attachment to the realty or other property.

You may, if you so elect, waive all right of owner-
ship in the above-described property and shall there-
upon become an unsecured creditor for the full
amount of the unpaid purchase price.

There shall be no change of the location of said
property nor any transfer, assignment, mortgage or

pledge thereof, without your written consent.

The covenants herein shall apply to all additions made to said property, but you assume no responsibility for work done, apparatus furnished and repairs made by others. [8]

COMPANY GUARANTEE.

The within described machinery is subject to the following warranty agreements:

That it shall be as described in the manufacturers' bulletin attached hereto, or of the latest improved design.

That it is to be well made of first class material and workmanship and should any part prove defective within one (1) year from date of sale, through defective material or workmanship the Company shall furnish duplicates of such parts free to the Purchaser f. o. b. cars Morenci, Arizona, provided, however the defective part is first returned to the Company for inspection at the Company's expense, should they so require.

It is understood and agreed that any machinery which the Company may furnish is guaranteed to properly perform the duty for which it is known to be intended by the Parties hereto, but the Company will not be responsible when the machinery is installed under any other conditions than those recommended by the Company or the Company's Engineer.

The Company guarantees the within described apparatus when working within 90% of its normal rated capacity of 600 H. P. and using California Asphaltum base crude oil, ranging from 14 to 18 degrees Baume, reduced to 60 degrees, Fahr., contain-

ing not less than 18,500 B. T. U. per pound and weighing approximately 7.8 pounds per gallon; to deliver at least 415 cubic feet of gas of at least 190 B. T. U. low value for each gallon of said oil fired, or one (1) gallon of oil as above defined will produce 78,500 B. T. U. in heat value of gas ranging from 190 to 210 B. T. U. low value per cubic feet; the gas to be of uniform quality within range of 5 B. T. U. of determined B. T. U. content of gas in regular operation and to be of similar analytic composition as that given in Manufacturers' bulletin hereto attached.

There will be no suspended matter contained in the gas which will be injurious to the Engines or gas conducting Pipes; samples of the gas to be taken from main after leaving holder delivering gas to Engine.

The Company agrees to furnish the plans and specifications for installation and to furnish the Purchaser an operating Engineer at Six (\$6.00) Dollars per day and expenses from date of leaving Los Angeles, until date of return. [9]

PURCHASERS' GUARANTEE.

The Purchasers agree to furnish—

Wash-water Pump

Blower

Piping

15,000 ft. Gas Holder.

and to notify the Company when the apparatus is ready for operation that the Company may send an operating Engineer to properly instruct the Pur-

chasers' employee in the operation and care of the apparatus herein specified.

Upon arrival of apparatus at Morenci to immediately commence to carry on the work of installing the apparatus with due diligence until same is completed all in accordance with the Company's plans and specifications.

To pay to the Company in addition to the purchase price herein set forth, the sum of Six (\$6.00) Dollars per day and expenses for the Company's operating Engineer.

To notify the Company when the apparatus herein specified is ready for operation that the Company may send their operating Engineer as herein specified.

To commence the operation as soon as practicable after completion of the installation and to operate same in accordance with the instructions of the Company's Engineer for a period of ninety(90) days, subject to adjustment of Gas Plant necessary to cause the machinery to give results provided for in this agreement.

At the end of said ninety (90) days' operation as herein specified, should the Purchaser fail to obtain the results in accordance with the above guarantees, then the Purchaser shall have the right to dismantle the apparatus, load such parts as were received from the Company on board cars for shipment in accordance with the Company's shipping instructions and no payment nor obligation of the Purchase Price on the part of the Purchaser will be required except that which applies to the operating Engineer and

the Company shall not be liable for any claim or damage except the return of any part of the Purchase Price paid except that which might have been paid for the operating Engineer.

TIME is expressly of the essence of this agreement. The above agreement is subject to the approval of an Officer of the Company.

(Signed) SMITH-BOOTH-USHER COMPANY,

By S. J. SMITH, Prest.,

(Approved) J. F. NICKELL, Secy.,

(Signed) THE DETROIT COPPER MINING CO. OF ARIZONA.

By A. T. THOMSON,

General Manager.

(Seal) December 5th, 1912. (Seal) [10]

INTERNATIONAL AMET GAS POWER COMPANY.

Crude Oil Gas Producers—Amet-Ensign Patents.

609 Central Building,

Los Angeles, California.

APPARATUS FOR PRODUCING FIXED GAS
FOR OPERATING GAS ENGINES.

THE MOST ECONOMICAL WAY TO PRODUCE
POWER FROM CRUDE OIL.

Producers Have Been Thoroughly Tried Out by
Years of Successful Operation.

Sectional Elevation. [11]

The great economy of the internal combustion engine and the perfection of such engines so that they are equal in reliability of service to steam engines,

as shown by many thousands of horse power of such engines now in constant operation, has led to the development of apparatus for making power gas from crude oil for use in gas engines.

By the Amet-Ensign method the same amount of power may be obtained from a gallon of crude oil as from a gallon of gasoline or distillate, with a saving of the difference in cost of at least three-fourths. As compared with the ordinary steam plant the saving is at least two-thirds and as compared with very large high-class plants with all the refinements of superheat and condensation the saving is still at least one-third.

These economies are now within the reach of all power users by the installation of Amet-Ensign gas producers, which convert crude oil into an absolute fixed gas; have been thoroughly tested and perfected by years of successful operation under practical everyday, continuous, operating conditions and are fully guaranteed. This guarantee extends to the removal of the apparatus and refund of cost if not fulfilled.

The producers are of simple construction, practically indestructible in ordinary use (as shown by the fact that no repairs have been necessary on those in use for several years), and require no more skill or labor to operate than an ordinary steam boiler fired with oil.

Four sizes are made at present as shown below. Plants of more than 400 horse-power are supplied with the requisite number of *unties* to make up the required power.

Horse- Power.	Floor Space.		Total Weight. Producer & Auxiliaries.
	Producer.	Auxiliaries.	
100	3'-2"x8'-0	5'-0"x10'-0"	10,000 lbs.
200	3'-8"x9'-0	5'-6"x11'-0"	13,500 lbs.
300	4'-0"x9'-3	6'-0"x12'-0"	18,000 lbs.
400	4'-6"x9'-6	7'-0"x14'-0"	22,000 lbs.

In addition to the producer and auxiliaries, which would ordinarily be installed inside the power plant, space will be required outside the building for a small gas-holder. The weights of these holders will range from 3,500 lbs. for 100 H. P. to 13,500 for 400 H. P. There will also be required a circulating water tank of capacity at the rate of 20 gallons per H. P. and if the water used for washing cannot be wasted, a small cooling tower which will permit the same water to be used continuously.

The full reliability and effective operation of the apparatus is susceptible of complete demonstration by plants installed and in operation. The construction of the producers and method of operation are explained below. [12]

In making producer gas from crude oil it is absolutely essential that the proper relative amounts of air and oil be maintained and that these relative proportions remain fixed under water variations in the amount of gas made, as required by variations in the load on the engines. In the Amet-Ensign producers the amounts of air and oil are adjustable and under the control of the operator, but after adjustment has been made, the relative proportions remain automatically constant so that the output of gas can be varied over a wide range as may be required by fluctuations of load, with practically con-

stant thermal valve of the gas.

The oil (maintained at uniform temperature by a thermostatically controlled heater) is fed in from a weir-box having an adjustable needle valve, the rate of flow being controlled by air pressure brought to the top of the oil from a special form of pilot tube, which is located in the air main and which practically measures the quantity of air entering the producer by the well-known action of that device, thus making the flow of oil proportional to the amount of air used. As the gas holder rises it engages a lever connecting with a balance relief valve on the air main, gradually reducing the total pressure so that the make of gas falls off in response to the decreased demand. Thus complete automatic governing is secured by a comparatively simple means without disturbing the relative amounts of air and oil and the same grade of gas is delivered in greater or less quantity as demanded by the power output of the plant.

The oil, as fed in from the weir-box runs down the adjacent inclined plate, and the air, entering from below, passes around the lower edge of the plate, maintaining combustion of such oil as reaches that point. The products of combustion, and of distillation from the upper part of the plate, pass through the brick-lined combining tube and down again to the first water seal. Sufficient heat is maintained to effect complete gassification, a carbon dioxide formed by the initial combustion being largely converted back into carbon monoxide by combination with the glowing free carbon originating from the decomposition of some of the lighter hydro-carbons of

the oil. Increased efficiency may be obtained by the injection of a small amount of steam, generated by a small boiler placed in the upper part of the producer and utilizing what would otherwise be wasted heat.

By this system a gas is made having the desirable low free hydrogen content and utilizing the remaining hydrogen by its conversion into effective gases so that about 7% of the heat value of the gas is in fixed hydro-carbon compounds and giving an efficiency of operation impossible with systems where the hydrogen is wasted.

A typical analysis of the gas produced by the Amet-Ensign process is as follows: [13]

	Per Cent.	B. T. U.
CO ₂	7.4	
O ₂	.3	
CO	8.6	27.8
Illuminants	4.7	99.7
CH ₄	6.6	66.6
H ₂	11.	35.9
	<hr/>	<hr/>
	Total	230.0
	Low value,	216.7

After passing the first water seal, the gas goes through the usual washing or scrubbing process, to remove suspended particles, the extent to which this is carried being dependent on the subsequent use of the gas, effective appliances for this purpose being supplied with the producers, which it is unnecessary to describe here as they are of everyday use in all gas works whatever the system of gas making em-

ployed. It should be noted, however, that for engine use it is unnecessary to clean the gas made by the Amet-Ensign process to a greater extent than to prevent deposits in the pipes, as there has never been a case of the slightest injury to engines cylinders from carbon with Amet-Ensign gas. Cylinders which have been in use several years are perfectly clean and show no appreciable wear.

While this system is more economical than any other wherever crude oil can be obtained at a reasonable cost, it offers special advantages in localities where transportation of fuel is high and where water is scarce or of bad quality.

Plans, specifications and complete data on electric, pumping, or other power plants will be furnished and contracts made covering either partial or complete installations.

Address inquiries to W. F. Staunton, Sales Agent.

INTERNATIONAL AMET GAS POWER CO,

609 Central Building,

Los Angeles, Calif.

Or to SMITH-BOOTH-USHER CO.,

228 Central Avenue, Los Angeles, Calif.

(Drawing.) [14]

and that the above is a full and complete copy of said agreement, except that the Manufacturer's Bulletin attached to said agreement contains certain drawings, diagrams and illustrations which it is impracticable to set forth in this complaint, and plaintiff hereby gives notice to defendant that evidence to prove the said diagram, drawings and illustrations will be introduced at the trial.

IV.

That by the terms of said agreement shipment of the machinery described in said agreement was to be made by plaintiff in approximately 45 days from the date of the acceptance of said agreement; that said shipment was made by plaintiff within approximately 90 days from the date of the acceptance of said agreement; that defendant, with full knowledge of plaintiff's default with respect to time of shipment as aforesaid, then and there received said machinery and consented to, acquiesced in and directed the erection and installation of and operated said machinery until on or about May 5, 1913; that defendant thereby waived strict performance of the agreement with respect to the time of said shipment and thereby accepted the performance of plaintiff in said respect as a substantial performance of said provision of said agreement, and as compliance with said agreement.

V.

That by the terms of said agreement defendant was to furnish for the operation of said machinery a fifteen thousand (15,000) foot gas-holder; that defendant refused and neglected, and still refuses and neglects to furnish the said fifteen thousand (15,000) foot gas-holder. [15]

VI.

That by the terms of the said agreement defendant was to pay to plaintiff the sum of \$10,000.00, with interest on said sum of \$10,000 from the date of the erection of said machinery until the payment thereof at the rate of six per cent per annum, upon the com-

pletion by defendant of a ninety days' trial of the machinery described in the said agreement, or at any time prior to the end of the said ninety days' trial should the defendant so elect; that the trial of the said machinery was commenced on or about the 27th day of March, 1913, and continued until the 6th day of May, 1913, or thereabouts; that upon the said trial the said machinery met each and all of the guarantees specified in the said agreement; that many days before the completion of said 90 days' trial, to wit, on or about the 28th day of May, 1913, defendant notified plaintiff that defendant would go no further with the said trial or said contract, and thereupon entirely abandoned the said contract and wrongfully refused to proceed further thereunder; that plaintiff was at all times ready and willing to continue with said trial and so notified defendant.

VII.

That plaintiff has performed all of the terms and conditions of the said agreement to be by it performed, except as set forth in paragraph IV above.

VIII.

That plaintiff has duly demanded said \$10,000 and the payment of said interest thereon from defendant; that defendant has not paid to the plaintiff the said sum of ten thousand (10,000) dollars nor any part thereof; that [16] defendant has not paid to plaintiff any interest on the said sum of ten thousand (\$10,000) dollars, or on any part of said sum; that there is now due, owing and unpaid from defendant to plaintiff the sum of ten thousand (\$10,-

000) dollars, with interest thereon at the rate of six per cent per annum from March 26, 1913.

SECOND CAUSE OF ACTION.

I.

Plaintiff repeats, refers to and makes a part hereof paragraphs I and II of the first cause of action herein contained, the same as if said paragraphs were here set out in full.

II.

That within two years last past, to wit, between December 1, 1912, and May 10, 1913, plaintiff sold and delivered to defendant, and defendant accepted from plaintiff, goods, wares and merchandise, which said goods, wares and merchandise were of the reasonable value of ten thousand (\$10,000) dollars.

III.

That plaintiff has duly demanded of defendant the payment of said \$10,000; that defendant has not paid to plaintiff the said sum of ten thousand (\$10,000) dollars nor any part thereof; that there is now due, owing and unpaid from the defendant to plaintiff the sum of ten thousand (\$10,000) dollars.

WHEREFORE, plaintiff prays judgment against the defendant as follows:

1st: for the sum of ten thousand (\$10,000) dollars.

[17]

2d: For interest on the said sum of ten thousand (\$10,000) dollars from and after the 6th day of March, 1913.

3d: For the costs of this action.

4th: For such other and further relief as to the Court may seem meet.

ALFRED WRIGHT and
OSCAR C. MUELLER,
SLOAN, SEABURY & WESTERVELT,
Attorneys for Plaintiff,
Fleming Building, Phoenix, Arizona. [18]

State of Arizona,

County of Maricopa,—ss.

S. J. Smith, being duly sworn, deposes and says: That he is the president of the plaintiff corporation in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters, that he believes it to be true, and that he makes this verification on behalf of said corporation.

S. J. SMITH.

Subscribed and sworn to before me this 22d day of January, 1914.

[Notarial Seal]

A. H. D. RIEMER,
Notary Public.

My commission expires Aug. 3, 1917. [19]

[Endorsements]: No. 97. In the United States District Court in and for the District of Arizona. Smith-Booth-Usher Company, a Corporation, Plaintiff, vs. The Detroit Copper Mining Company of Arizona, Defendant. Amended Complaint. Received copy of the within Amended Complaint this 22d day of January, 1914. Ellinwood & Ross, Attor-

neys for Defendant. Filed January 23, 1914, at 10:40 A. M. George W. Lewis, Clerk. Alfred Wright and Oscar C. Mueller, Sloan, Seabury & Westervelt, Fleming Building, Phoenix, Arizona. [20]

*In the United States District Court, in and for the
District of Arizona.*

SMITH-BOOTH-USHER COMPANY, a Corporation,

Plaintiff,

vs.

THE DETROIT COPPER MINING COMPANY
OF ARIZONA,

Defendant.

Amended Answer.

Comes now The Detroit Copper Mining Company of Arizona, the defendant above named, and answering plaintiff's amended complaint, demurs to the first count or cause of action therein attempted to be stated, and for ground of demurrer alleges that said first count or cause of action does not state facts sufficient to constitute a cause of action against this defendant.

WHEREFORE, defendant prays judgment as to the sufficiency of said complaint and for its costs herein expended.

(Signed) ELLINWOOD & ROSS,

Attorneys for Defendant.

Comes now the defendant above named and an-

swering the first count or cause of action to plaintiff's amended complaint:

I.

Defendant admits the allegations of paragraph I, II and III thereof; admits that by the terms of the agreement set forth in the complaint, shipment of the machinery described therein was to be made by plaintiff in approximately forty-five (45) days from the date of the acceptance of said agreement and [21] that said shipment was made by plaintiff within approximately ninety (90) days from said date; admits that said machinery was received at Morenci, Arizona, and that the same was erected and installed, but denies that this defendant directed the erection and installation of said machinery, and alleges, on the contrary, that subsequent to the date of said contract, at the suggestion of plaintiff herein, plaintiff was permitted to send a representative, represented by plaintiff to be skilled in and familiar with the erection and installation of said machinery, and that the same was thereafter erected and installed by this defendant, under the direction of plaintiff's said representative and in full accordance therewith; denies that this defendant operated said machinery until on or about May 5th, 1913, or at any other time, or at all; denies each and all, every and singular the remaining allegations in paragraph IV of said amended complaint contained, except as hereinabove admitted or qualified.

II.

Admits that by the terms of said agreement defendant was to furnish a fifteen thousand (15,000)

foot gas-holder, but denies that said gas-holder was to be furnished to plaintiff herein, or that plaintiff was in any manner interested in the furnishing of said gas-holder. Denies that defendant refused or neglected or that it does now neglect or refuse to furnish said fifteen thousand (15,000) foot gas-holder either as alleged in said amended complaint or otherwise, but, on the contrary, alleges the fact to be that this defendant did furnish said fifteen thousand (15,000) foot gas-holder in all respects as required by said contract, and that said gas-holder is now and at all times since the date of the said agreement has been, with the knowledge of plaintiff, equipped in place, connected and ready to be used in connection with the machinery and equipment described in said agreement whenever said machinery and equipment was ready in accordance with the terms of said agreement to be used therewith. [22]

III.

Denies that by the terms of said agreement, defendant was to pay plaintiff the sum of Ten Thousand (\$10,000.00) Dollars, with interest thereon from the date of the erection of said machinery until payment, at the rate of six per cent (6%) per annum, upon completion by defendant of a ninety (90) days trial of the machinery described in said agreement, or at any time prior thereto should defendant so elect, and alleges that by the terms of said agreement, as fully appears therefrom, defendant was to pay plaintiff for said machinery, the sum of Ten Thousand (\$10,000.00) Dollars on the completion of the ninety (90) days' trial run and operation

of said machinery by defendant, in accordance with the instructions of plaintiff's engineer, and then only in the event that said machinery should meet the guaranties specified in said agreement; alleges that under the conditions aforesaid, but not otherwise, defendant was required by said agreement to pay interest on said Ten Thousand (\$10,000.00) Dollars at the rate of six per cent (6%) per annum from date of erection until paid.

IV.

Admits that a trial run of said machinery was commenced on or about the 27th day of March, 1913, but denies that the same was continued until the 6th day of May, 1913, or thereabouts either as alleged in said complaint or otherwise; on the contrary, this defendant alleges that upon the completion of the installation of said machinery, under and in accordance with the directions of plaintiff's representative as aforesaid, this defendant in accordance with the terms of said contract notified plaintiff that said machinery was ready for operation in order that plaintiff might send their operating engineer as specified in said contract; that thereupon said plaintiff did send such operating engineer to instruct defendant's employees in the operation [23] and care of said machinery, and that said engineer at all times thereafter had complete charge and control of said trial run and operation of said machinery.

V.

The said machinery was erected and installed in all respects in accordance with the plans and specifications furnished by plaintiff for that purpose as re-

quired by said agreement, and that upon the installation thereof, and after the arrival of plaintiff's said engineer, a trial run and operation thereof was attempted and continued unsuccessfully and with numerous interruptions until on or about May 6th, 1913.

VI.

Denies that upon the said trial, the said machinery met each or any of the guaranties specified in said agreement. Denies that before the completion of said ninety (90) days trial or at any time, or at all, this defendant wrongfully refused to proceed further under said contract; admits that on or about the 28th day of May, 1913, defendant notified plaintiff that defendant would go no further with the said contract but alleges that prior to said notice, plaintiff herein, after it had become fully apparent that said machinery could not be made to comply with the guaranties and conditions of said agreement admitted that the same was not in compliance therewith, nor in conformity to the requirements of said agreement and at its own expense took over the operation of said machinery, and for a long time attempted in vain to operate the same in accordance with the requirements of said agreement. That plaintiff thereupon freely admitted that said machinery did not comply with the warranties or guaranties of said agreement and thereupon voluntarily abandoned further attempt to run or operate the same, and asked this defendant to grant plaintiff [24] a long extension of time within which to substitute other and different

machinery from that originally installed, with the hope that said machinery might be made to meet the guaranties specified in said agreement; this defendant having been already delayed a long period of time beyond that specified in said contract declined to grant said extension of time, and thereupon notified plaintiff as aforesaid that it would not proceed further under said contract.

VII.

Denies that plaintiff was at all times ready and willing to continue with said trial or that plaintiff so notified defendant either as alleged in said complaint or otherwise.

VIII.

Denies that plaintiff performed all of the terms and conditions of said agreement to be by it performed, either as alleged in said amended complaint or otherwise; admits that plaintiff has demanded payment of said Ten Thousand (\$10,000) Dollars and interest, and that defendant has not paid the same or any part thereof, but denies there is now due, owing and unpaid from defendant to plaintiff the sum of Ten Thousand (\$10,000.00) Dollars or any other sum or interest thereon, either as alleged in the said amended complaint or otherwise.

IX.

Further answering the first count or said amended complaint, defendant alleges that by the terms of said agreement the machinery therein described was required to be as described in the manufacturer's bulletin attached thereto and set out in said

complaint, or of the latest improved design; [25] that said manufacturer's bulletin specified that a vertical scrubber should be installed and used in connection with the gas producer plant described in said agreement; that plaintiff did not furnish such vertical scrubber, either as specified in said contract or otherwise, but, on the contrary, represented that a certain horizontal scrubber was the latest improved design of scrubber to be used in connection with said plant and exercising its said option in that behalf under said contract furnished such horizontal scrubber for installation and use in connection with said plant, and that the same was installed according to plans and specifications furnished by plaintiff and in accordance with the directions of plaintiff's representative as a part of said plant.

X.

That among other things it was warranted and guaranteed in and by said agreement on the part of plaintiff herein as follows:

(1) That said machinery should properly perform the duty for which it was known to be intended by the parties to said agreement.

(2) That said machinery would produce gas ranging in heat value from 190 to 210 British thermal units, low value, per cubic foot, which gas should be of uniform quality within range of five (5) British thermal units of determined heat contents of gas in regular operation.

(3) That said gas should contain no suspended matter, which would be injurious to engines or gas conducting pipes, samples of the gas to be taken from

the main after leaving the holder, delivering as to the engines.

(4) That it was further agreed and stipulated [26] in and by said agreement that if upon the aforesaid trial run and operation, defendant failed to obtain the results in accordance with the guaranties of said agreement, it should have the right to dismantle said gas plant and be under no further obligation for or on account of the purchase price thereof.

(6) That defendant in all respects fully performed and completed all of the terms of said agreement on its part to be performed.

(7) That upon the completion of the installation of said machinery as aforesaid, defendant undertook to operate the same under the direction of plaintiff's said engineer and that plaintiff undertook to operate same; that upon said operation said machinery wholly and in all respects failed to meet or perform the guaranties specified in said agreement; that upon such operation said machinery wholly failed to perform the duty for which it was known to be intended by the parties to the agreement; that the gas produced by said machinery upon such operation was not of uniform quality within range of five (5) British thermal units of determined heat contents of such gas in regular operation; that the gas produced by said machinery upon such operation was so inferior in quality and grade and so charged with soot and suspended matter as to be not only entirely useless for the purpose for which it was known by parties to said agreement to be intended, but so as to be

highly injurious to the engines and gas conducting pipes of this defendant; that in the course of said trial run and operation said gas on several occasions was turned into the said fifteen thousand (15,000) foot gas-holder and into defendant's gas-mains, but was so heavily charged with soot, lampblack and suspended matter as to be highly injurious to said holder and mains, depositing therein such great quantities of such soot, lampblack and suspended matter as to cause the [27] complete shutdown of defendant's plant and cessation of its mining operations, because of which said gas was turned out of said holder and mains with the consent and acquiescence of plaintiff, and because of all of which it was impossible to take samples of said gas from the main after leaving said holder, but samples of said gas as produced by said machinery were taken after it left said gas generators on its way to said holder and mains; that upon said operation said gas plant wholly failed to produce gas ranging in heat value from 190 to 210 British thermal units, low value, per cubic foot; that said machinery furnished by plaintiff under said agreement was not well made or of first class material or workmanship.

That by reason of the matters and things hereinabove specified and of the entire failure of said machinery to meet or comply with the guaranties of said agreement on plaintiff's part to be performed, this defendant became and now is wholly absolved and released from any obligation to pay any part of the purchase price thereof; that when it became fully apparent that said machinery could not be made to

comply with the guaranties and conditions of said agreement on plaintiff's part to be performed, this defendant notified plaintiff that it would proceed no further under said contract and asked plaintiff to dismantle said gas plant and remove the same as soon as possible; that plaintiff has not dismantled said gas plant, but that the same is still in place upon defendant's property at Morenci, Arizona, subject to plaintiff's orders.

WHEREFORE, defendant having fully answered said first cause of action, prays that plaintiff take nothing thereby and for its costs herein expended.

ELLINWOOD & ROSS,

Attorneys for Defendant. [28]

Further answering the second count or cause of action in said amended complaint contained, defendant admits the allegations of paragraph one (1) thereof; denies each and every, all and singular, the remaining allegations in the second cause of action contained; denies specifically that the account or claim alleged in the second cause of action or any item thereof is true or just, and alleges that each and every item thereof is unjust and untrue.

Further answering said second cause of action in said amended complaint, this defendant realleges and fully makes a part thereof all of the admissions and allegations hereinabove set forth in answer to the first cause of action of said amended complaint, failing to set the same out at length for purpose of brevity and to avoid repetition.

Defendant alleges further that the matters and things mentioned and relied upon by plaintiff in its

second cause of action are the same and only those which are set out and relied upon by plaintiff in its first cause of action herein, and that defendant has had no further transactions or dealings with plaintiff during the period mentioned in said second cause of action, excepting those referred to and set out in plaintiff's first cause of action which is fully answered above herein; that all of said transactions are fully controlled by the written contract set out in plaintiff's first cause of action and in the subsequent modification thereof as set forth above herein, in answer to said first cause of action, and for purpose of brevity and to avoid repetition, this defendant refers to the foregoing amended answer to plaintiff's first cause of action and makes the same as fully a part of its amended answer to the second cause of action as if the same were set out at length at this point. [29]

WHEREFORE, defendant having fully answered, prays that plaintiff take nothing by its cause of action and for its costs herein expended.

ELLINWOOD & ROSS,

Attorneys for Defendant.

State of Arizona,

County of Maricopa,—ss.

A. T. Thomson, being duly sworn according to law, deposes and says: That he is general manager of the Detroit Copper Mining Company of Arizona, a corporation, defendant in the above-entitled action, and makes this affidavit for and on behalf of said defendant, being duly authorized thereunto; that he has read the foregoing amended answer and knows the

contents thereof; that the denials and allegations therein contained are true in substance and in fact.

[Seal] (Signed) A. T. THOMSON.

Subscribed and sworn to before me this 23d day of January, A. D. 1914.

MARY CURAIN,
Notary Public.

My commission expires Nov. 2, 1917. [30]

[Endorsements]: No. 97. In the United States District Court, in and for the District of Arizona. Smith-Booth-Usher Company, a Corporation, Plaintiff, vs. The Detroit Copper Mining Company of Arizona, Defendant. Amended Answer. Copy received this 23d of Jan. 1914. Sloan, Seabury & Westervelt, Alfred Wright, Attys. for Plaintiff. Filed January 23, 1914, at 10:50 A. M. George W. Lewis, Clerk. Law Offices: Stoneman & Ling, 405, 406 and 407 Goodrich Block, Phoenix, Arizona. [31]

[Minutes of Court—January 23, 1914—Trial.]

MINUTE ENTRY APPEARING UNDER DATE
OF JANUARY 23, 1914.

No. 97.

SMITH-BOOTH-USHER COMPANY,
Plaintiff,

vs.

DETROIT COPPER MINING COMPANY,
Defendant.

This case came on regularly this day for trial, Wm. M. Seabury, Esquire, and Alfred Wright, Es-

quire, appearing as counsel for the plaintiff; and E. E. Ellinwood, Esquire, and J. E. Ross, Esquire, appearing as counsel for the defendant herein, comes now into open court and both sides announce ready for trial. Thereupon, the clerk was ordered to draw eighteen from the box wherein he had deposited in the presence of the Court, the names of the jurors summoned and not excused, and the names of eighteen persons were thereupon drawn and all answering thereto, respectively, took their places in the jury-box. The said jurors were thereupon duly sworn and examined on their *voir dire*. The panel being now full and complete and said jurors in the jury-box having been passed for cause by both the plaintiff and defendant, the respective parties exercised their right of peremptory challenge and the following named jurors were called according to law to constitute the jury, viz.: Sidney J. Doster, C. A. Becker, C. P. Hort, C. W. Wozley, W. D. Kendrick, James F. Goddard, J. L. Taylor, Adam Gleim, G. L. Stannard, F. A. Weage, H. M. Lewis and Isaac Landers, who were duly sworn to well and truly try the issues joined between the plaintiff and defendant herein, whereupon the plaintiff reads its amended complaint and makes its opening statement in order to maintain upon its part the issues herein; [32] and thereupon the defendant, in order to maintain upon its part the issues herein, reads its answer and makes its opening statement; whereupon Florence Ward Voorhees is called as a witness for the plaintiff, who was duly sworn, examined and cross-examined and plaintiff offers exhibit

(Exhibit "A"), in evidence, which was admitted and ordered filed; and this time being the time for recess, the Court instructed the jury and thereupon excused them until Saturday, January 24, 1914, at 10:00 o'clock A. M., at which time further trial of this case is ordered continued. [33]

[Minutes of Court—January 24, 1914—Trial
Resumed.]

MINUTE ENTRY APPEARING UNDER DATE
OF JANUARY 24, 1914.

No. 97.

SMITH-BOOTH-USHER COMPANY,
Plaintiff,

vs.

DETROIT COPPER MINING COMPANY,
Defendant.

This case having been continued from a previous session of this Court, comes now the counsel for the plaintiff and defendant herein into open court, and comes also the jurors herein, their names are called and all answering thereto, respectively, the further trial was resumed. J. H. Cox was called to the stand as a witness for the plaintiff, sworn, examined and cross-examined, and plaintiff offers in evidence Exhibit "B," which was admitted and ordered filed. Further proceedings in the case were continued for trial until Monday, January 26, 1914, at 10:00 o'clock A. M. [34]

[Minutes of Court—January 26, 1914—Trial
Resumed.]

MINUTE ENTRY APPEARING UNDER DATE
OF JANUARY 26, 1914.

No. 97.

SMITH-BOOTH-USHER COMPANY,
Plaintiff,

vs.

DETROIT COPPER MINING COMPANY,
Defendant.

This case having been continued from a previous session of this court, comes now the counsel for the plaintiff and defendant herein into open court, and comes also the jurors herein, their names are called and all answering thereto, respectively, the further trial was resumed. J. H. Cox, being still on the stand, is cross-examined. Defendant offers in evidence Exhibit 7, which is admitted; also plaintiff offers Exhibit "C" in evidence, which is admitted. S. J. Smith was called to the stand as a witness on behalf of the plaintiff, sworn, examined and cross-examined. Plaintiff offers Exhibit "D" in evidence, which is admitted. The deposition of O. H. Ensign was read to the jury on behalf of the plaintiff; and thereupon the plaintiff rested its case. Further trial of the case was ordered continued until Tuesday, the 27th day of January, A. D. 1914, at 9:30 o'clock A. M. [35]

[Minutes of Court—January 27, 1914—Trial
Resumed.]

MINUTE ENTRY APPEARING UNDER DATE
OF JANUARY 27, 1914.

No. 97.

SMITH-BOOTH-USHER COMPANY,
Plaintiff,

vs.

DETROIT COPPER MINING COMPANY,
Defendant.

This case having been continued from a previous session of this court, comes now the counsel for the plaintiff and defendant herein into open court, and comes also the jurors herein, their names are called, and all answering thereto, respectively, the further trial was resumed. Defendant moves the Court to instruct the jury to bring in a verdict in favor of the defendant upon the grounds set out in its written motion this day filed herein, and the said motion is argued by plaintiff and defendant and submitted to the Court for its decision, and the Court takes same under advisement until to-morrow, Wednesday, the 28th day of January, A. D. 1914, at 9:30 o'clock A. M., to which time further proceedings in this case are accordingly ordered continued. [36]

[Minutes of Court—January 28, 1914—Trial
Resumed.]

MINUTE ENTRIES APPEARING UNDER
DATE OF JANUARY 28, 1914.

No. 97.

SMITH-BOOTH-USHER COMPANY,
Plaintiff,

vs.

DETROIT COPPER MINING COMPANY,
Defendant.

This case having been continued from a previous session of this court, comes now the counsel for the plaintiff and defendant herein into open court, and comes also the jurors herein, their names are called and all answering thereto, respectively, the further trial was resumed. The Court, having maturely considered the motion made by the defendant of yesterday for the Court to instruct the jury to return a verdict for the defendant, the said motion was granted and thereupon the Court instructed the jury to bring in a verdict in favor of the defendant; and thereupon the jury returned the following verdict:

“SMITH-BOOTH-USHER COMPANY,
Plaintiff,

vs.

DETROIT COPPER MINING COMPANY,
Defendant.

We, the jury, duly empaneled and sworn in the above-entitled action, do find for the defendant.

J. F. GODDARD,
Foreman."

The clerk inquired of the jurors whether such is their verdict, they say that it is, and so say they all, and thereupon the jury was ordered discharged by order of the Court. Upon motion of the defendant, which is resisted by the plaintiff, it is ordered that judgment be entered in favor of the defendant in accordance with the said [37] verdict, to which order of the Court the plaintiff excepts, and upon application of the plaintiff, sixty days from the entering of the verdict herein is given to the plaintiff in which to prepare and file its bill of exceptions herein.

**[Order Granting Leave to Substitute Defendant's
Exhibit "X."]**

No. 97.

SMITH-BOOTH-USHER COMPANY,
Plaintiff,
vs.
DETROIT COPPER MINING COMPANY,
Defendant.

In pursuance of a stipulation of the counsel on both sides,

IT IS ORDERED that the defendant be granted leave to substitute a copy of a letter of May 6, 1913, marked for identification "Defendant's Exhibit '6,'" and have same filed herein. [38]

No. 97.

SMITH-BOOTH-USHER CO.,

Plaintiff,

Against

THE DETROIT COPPER MINING CO.,

Defendant.

Verdict.

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the defendant.

(Signed) J. F. GODDARD,
Foreman. [39]

*In the District Court of the United States, in and for
the District of Arizona.*

SMITH-BOOTH-USHER COMPANY, a Corpora-
tion,

Plaintiff,

vs.

THE DETROIT COPPER MINING COMPANY
OF ARIZONA,

Defendant.

Judgment.

This cause having been theretofore set for trial on the 21st day of January, 1914, and being regularly postponed until the 23d day of January, 1914, came on regularly for trial on said 23d day of January, 1914, plaintiff appearing by W. M. Seabury and Alfred Wright, Esqs., its attorneys and defendant

appearing by Messrs. Ellinwood and Ross, its attorneys. A lawful jury of twelve (12) men was duly and regularly impaneled to try said cause. Evidence oral and documentary was introduced on behalf of plaintiff and plaintiff rested. Thereupon defendant filed its written motion that the jury be instructed by the Court to return a verdict in favor of the defendant, for the reasons and upon the grounds stated in said motion, which said [40] motion was thereupon argued to the Court by the respective counsel for plaintiff and defendant, and submitted to the Court for its decision thereon. The Court having fully considered said motion and the evidence and pleadings herein and being duly advised in the premises, thereupon, on the 28th day of January, 1914, ordered that said motion be and the same was thereupon granted. The jury was thereupon instructed to return a verdict herein in favor of the defendant which was accordingly done, whereupon defendant moved for judgment upon and in accordance with said verdict that plaintiff take nothing by its action and that defendant have judgment for its costs, which motion was by the Court granted and judgment ordered accordingly.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff take nothing by this action and that defendant do have and recover from plaintiff its costs herein expended, taxed by the clerk at Two Hundred Forty-six and 30/100 (\$246.30) Dollars.

Done in open court this 28th day of January, 1914.

District Judge. [41]

[Endorsements]: No. 97. In the United States District Court, in and for the District of Arizona. Smith-Booth-Usher Company, a Corporation, Plaintiff, vs. The Detroit Copper Mining Company of Arizona, Defendant. Judgment. Filed January 28, 1914. George W. Lewis, Clerk. Copy recd. this 28th of Jan., 1914. Sloan, Seabury & Westervelt, Attys. for Plaintiff. Law Offices: Stoneman & Ling, 405, 406 and 407 Goodrich Block, Phoenix, Arizona. [42]

[Minutes of Court—March 12, 1914—Order Extending Time to File New Bill of Exceptions to April 14, 1914, etc.]

MINUTE ENTRY APPEARING UNDER DATE
OF MARCH 12th, 1914.

No. 97.

SMITH-BOOTH-USHER COMPANY,
Plaintiff,

vs.

DETROIT COPPER MINING COMPANY,
Defendant.

IT IS ORDERED that the plaintiff herein be allowed to and including the first day of April, 1914, within which to make and file a new bill of exceptions and to make motion for a re-trial, in accordance with a stipulation this day filed herein. [43]

[**Minutes of Court—April 18, 1914—Order Extending Time to File Bill of Exceptions to May 11, 1914.**]

MINUTE ENTRY APPEARING UNDER DATE
OF APRIL 18, 1914.

No. 97.

SMITH-BOOTH-USHER COMPANY, a Corpora-
tion,

Plaintiff,

vs.

THE DETROIT COPPER MINING COMPANY
OF ARIZONA, a Corporation,

Defendant.

It appearing by stipulation, dated April 16th, 1914, signed by the attorneys for the plaintiff and the defendant, that the consent of the defendant herein has been obtained for the entrance of this order;

IT IS HEREBY ORDERED that the time in which the plaintiff may file its bill of exceptions in the above-entitled cause is extended to and including the 11th day of May, 1914. [44]

*In the District Court of the United States for the
District of Arizona.*

SMITH-BOOTH-USHER COMPANY, a Corpora-
tion,

Plaintiff,

vs.

THE DETROIT COPPER MINING COMPANY
OF ARIZONA, a Corporation,

Defendant.

Petition for New Trial.

Comes now Smith-Booth-Usher Company, the plaintiff above named, and moves the Court to vacate and set aside the verdict entered upon the direction of the Court in the above-entitled cause on January 28, 1914, in favor of the defendant and against the plaintiff above named, and to grant the plaintiff a new trial of said cause upon each and all of the following grounds:

I.

Upon the ground that the learned Court erred in directing a verdict by the jury at the close of the plaintiff's case in said cause in favor of the defendant against the plaintiff above named.

II.

Upon the ground that the said verdict is contrary to and against the law.

III.

Upon the ground that errors in law occurring [45] at the trial were committed which required the said verdict to be set aside and a new trial to be granted, and in this connection your petitioner respectfully alleges that the said errors last referred to, among others, consisted in the following:

1.

That the Court erred in sustaining defendant's objection to and excluding testimony offered by plaintiff by which plaintiff proposed to show that the gas produced by the plant in question in this action was not injurious to the pipes and engines connected with said plant by showing that the gas

produced by other plants exactly similar to the plant in question, operating under the same conditions and producing similar gas had not acted upon the pipes and engines connected therewith in a manner injurious to them.

2.

The Court erred in sustaining defendant's objection to and excluding expert testimony offered by plaintiff by which plaintiff proposed to show that the plant in question in this action performed the functions required of it by the contract.

3.

The Court erred in sustaining defendant's objection to and excluding testimony offered by the plaintiff by which plaintiff proposed to show the circumstances existing at the time the defendant refused to go on with the contract, and that plaintiff never abandoned the contract, but was ready, willing and able to perform and did perform [46] the terms and conditions of the contract to be by it performed.

4.

The Court erred in sustaining defendant's objection and excluding expert testimony offered by the plaintiff by which plaintiff proposed to show the tests made of the plant in question, the reason why the test made by plaintiff was made in the way it was made, the results achieved by the tests and the difference due to defendant's failure to furnish a 1500 foot gas-holder.

5.

The Court erred in sustaining defendant's objec-

tion to and excluding expert testimony by the plaintiff, by which plaintiff proposed to show the harmless effect of the suspended matter in the gas generated by the plant in question in this action.

6.

The Court erred in overruling plaintiff's objections to questions propounded by the defendant on its cross-examination of plaintiff's witnesses and in admitting evidence evoked by said questions and in denying motions to strike out said evidence upon the ground that said questions and evidence were not proper cross-examination, were immaterial and incompetent, were an indirect method of avoiding a ruling previously made on the same evidence by the Court, that no proper foundation had been laid for the impeachment of plaintiff's witnesses; that said evidence was inadmissible under the pleadings; that all negotiations made by the parties were merged in the contract, which is in evidence, and that the evidence tended to vary a written contract [47] which is in evidence.

7.

The Court erred in overruling plaintiff's objections to questions propounded by the defendant on its cross-examination of plaintiff's witness Cox and in admitting the evidence evoked by said questions upon the ground that said questions and evidence are inadmissible as incompetent and immaterial, as improper cross-examination of said witness, and as not within the pleadings, and that the said witness had no power to alter or modify the terms of the written contract between the parties in this

case, and that said evidence does not relate to an installation under the contract, but merely to all effort to endeavor to satisfy the defendant in these respects, and that it had not been offered to affect the credibility of said witnesses; that no proper foundation had been laid for the impeachment of said witness and that said evidence was not the best evidence as to what was in a written document.

8.

The Court erred in sustaining defendant's objection to and excluding testimony of the witness Smith offered by the plaintiff by which plaintiff proposed to show the limits of the authority of Mr. Cox to act on behalf of plaintiff.

9.

The Court erred in sustaining defendant's objection to and excluding testimony offered by the plaintiff by which plaintiff proposed to prove the second cause of action alleged in the complaint for goods, wares and merchandise, [48] *gold* and delivered.

IV.

The Court erred in deciding for itself and in failing to submit to the jury the issue of fact as to whether plaintiff had performed the terms of the contract on its part to be performed, substantially or otherwise, and whether plaintiff's performance was prevented by the wrongful act of failure on the defendant's part to perform some duty which under said contract it owed to plaintiff and which it undertook and promised to perform.

V.

The Court erred in determining all questions of fact

presented by the evidence and in not allowing these issues to be passed upon and determined by the jury.

VI.

The Court erred in deciding that it nowhere appeared in the evidence that defendant prevented plaintiff from continuing the experiments in accordance with the contract.

VII.

The Court erred in deciding that defendant had a right to decline to proceed under the contract before the expiration of the time provided in the contract for trial tests.

VIII.

The Court erred in deciding that the plaintiff [49] was required to prove that upon the trial of the machinery it met each and all of the guaranties specified in the agreement and that plaintiff had fully performed each and all of the terms of said agreement, because the undisputed evidence was that before the expiration of the period of ninety days in which plaintiff could have performed, defendant refused to permit it to proceed with its tests and terminated the contract, and because notwithstanding such acts on the defendant's part, there was evidence establishing that plaintiff had, in fact, substantially performed its contract before complete performance was rendered impossible by defendant.

WHEREFORE your petitioner respectfully prays that the verdict herein upon the direction of the Court on January 28, 1914, may be vacated and set aside, that a new trial of the issues in said cause

be granted to your petitioner upon each and all of the aforesaid grounds.

Dated this 25th day of May, 1914.

ALFRED WRIGHT,

SLOAN, SEABURY & WESTERVELT,

Attorneys for Plaintiff,

Fleming Building, Phoenix, Arizona. [50]

[Endorsed]: In the District Court of the United States for the District of Arizona. Smith-Booth-Usher Company, a Corporation, Plaintiff, vs. The Detroit Copper Mining Company of Arizona, a Corporation, Defendant. Petition for New Trial. Filed Apr. 25, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [51]

**[Minutes of Court—May 7, 1914—Order Extending
Time to File Bill of Exceptions to May 26, 1914.]**

MINUTE ENTRY APPEARING UNDER DATE
OF MAY 7th, 1914.

SMITH-BOOTH-USHER COMPANY, a Corpo-
ration,

Plaintiff,

vs.

THE DETROIT COPPER MINING COMPANY
OF ARIZONA, a Corporation,

Defendant.

It appearing by stipulation attached hereto, dated May 6th, 1914, signed by the attorneys for the plaintiff and the defendant, that the consent of the defend-

ant herein has been obtained for the entrance of this order:

IT IS HEREBY ORDERED that the time in which the plaintiff may file its bill of exceptions in the above-entitled cause is extended to and including the 26th day of May, 1914. [52]

[Acknowledgment of Service of Proposed Bill of Exceptions.]

In the United States District Court for the District of Arizona.

SMITH-BOOTH-USHER COMPANY,

Plaintiff,

vs.

DETROIT COPPER MINING COMPANY OF
ARIZONA,

Defendant.

Defendant hereby acknowledges service upon it this day of a draft of a proposed bill of exceptions in the above-entitled cause.

Dated, Bisbee, Arizona, this 26th day of May, 1914.

(Signed) ELLINWOOD & ROSS,

Attorneys for Defendant. [53]

[Endorsements]: No. 97 (Phoenix). In the United States District Court for the District of Arizona. Smith-Booth-Usher Company, Plaintiff, vs. The Detroit Copper Mining Company of Arizona, Defendant. Acknowledgment of Service of Draft of Proposed Bill of Exceptions. Filed May 28th, 1914.

George W. Lewis, Clerk. By Robert E. L. Webb,
Deputy. [54]

*In the United States District Court for the District
of Arizona.*

SMITH-BOOTH-USHER COMPANY,
Plaintiff,
vs.

DETROIT COPPER MINING COMPANY OF
ARIZONA,
Defendant.

Order Denying Motion for New Trial.

And now comes the plaintiff by its attorney and files herein and presents to the Court its petition and motion for a new trial of this cause, and this matter coming on this day regularly to be heard, William M. Seabury, Esq., appearing as counsel for the plaintiff on behalf of said motion, and ————, Esq., appearing on behalf of the defendant in opposition thereto;

Now, on consideration thereof, the Court does, over the exception of the plaintiff duly made, overrule and deny said petition and motion for a new trial and refuses to grant plaintiff a new trial of this cause.

WM. H. SAWTELLE,
Judge.

Done in open court at Tucson, this 24th day of June, 1914. [55]

[Endorsed]: In the United States District Court for the District of Arizona. Smith-Booth-Usher

Company, Plaintiff, vs. Detroit Copper Mining Company of Arizona, Defendant. Order Denying Motion for New Trial. Filed Jun. 24, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [56]

*In the United States District Court for the District
of Arizona.*

SMITH-BOOTH-USHER COMPANY,

Plaintiff,

vs.

DETROIT COPPER MINING COMPANY OF
ARIZONA,

Defendant.

Petition for Writ of Error.

And now comes the Smith-Booth-Usher Company, plaintiff in the above-entitled action, and says that on January 28, 1914, this Court granted a motion herein made by defendant and opposed by the plaintiff for the Court to instruct the jury to return a verdict for the defendant, and the Court instructed the jury to bring in a verdict in favor of the defendant; thereupon the jury returned a verdict for the defendant, and on motion of the defendant opposed by the plaintiff the Court ordered that judgment be entered in favor of the defendant in accordance with said verdict, in which order, instructions, proceedings and the proceedings had prior thereto in this cause certain errors were committed, to the prejudice of the plaintiff, all of which will in more detail appear from

the assignment of errors which is filed with this petition.

WHEREFORE, this plaintiff prays that a writ of error may issue in this behalf, out of the United States *Circuit* of Appeals for the Ninth Circuit, for the correction of errors so complained of *an* that a transcript of the records, proceedings and the papers in this cause, duly authenticated, may be sent to the said Court of Appeals.

ALFRED WRIGHT,

SLOAN, SEABURY & WESTERVELT,

Attorneys for Plaintiff. [57]

[Endorsed]: In the United States District Court for the District of Arizona. Smith-Booth-Usher Company, Plaintiff, vs. Detroit Copper Mining Company of Arizona, Defendant. Petition for Writ of Error. Filed Jun. 24, 1914, at — M. George W. Lewis, Clerk By R. E. L. Webb, Deputy. [58]

*In the United States District Court for the District
of Arizona.*

SMITH-BOOTH-USHER COMPANY,

Plaintiff,

vs.

DETROIT COPPER MINING COMPANY OF
ARIZONA,

Defendant.

Assignment of Errors.

The plaintiff, the Smith-Booth-Usher Company, in connection with and as a part of its petition for a

writ of error filed herein, makes the following assignments of error which it avers were committed by the Court in ordering that judgment be entered in favor of the defendant in accordance with the verdict rendered pursuant to instructions by the Court in the proceedings in said cause before and after the rendition of said judgment appearing in the records herein, that is to say:

I.

The Court erred in sustaining defendant's objection to and excluding testimony offered by plaintiff, by which plaintiff proposed to show that the gas produced by the plant in question in this action was not injurious to the pipes and engines connected with said plant, by showing that the gas produced by other plants exactly similar to the plant in question operating under the same conditions and producing similar gas did not act upon the pipes and engines connected therewith in a manner injurious to them. For the purpose of eliciting this testimony, plaintiff propounded the following questions: [59]

TO J. H. COX:

Q. Now, will you tell us, if you recall, what, if any other plants, similar to the plant in this case, have you erected or superintended the erection of.

A. Two others exactly similar to this.

Q. Two others exactly similar to this? A. Yes.

Q. Whereabouts were those?

A. One was here in Arizona, about 20 miles northwest of here in this state and another one in California about 30 miles from Los Angeles.

Q. Now, do you know what the capacity of those plants were? A. They were 200 horse-power each.

Q. Is that the capacity of this plant?

A. That is approximately, one-third of the capacity of this plant. In other words, this was about 600 horse-power.

Q. And were each of the other two plants 200 horse-power? A. 200 horse-power plants.

Q. In each case is that right? A. Yes.

Q. Would that mean, Mr. Cox, that in the other plants, there was only one, instead of three units, gas-producer? A. Yes.

Q. And the number of units, was that the only difference in the plants?

A. That was practically the only difference, only that the other plants consisted of complete plants, engines, gas plant complete, the engine, all its auxiliaries, together with the pumping equipment that went to make up the complete plant. This plant in question now, was the gas plant only.

Mr. ELLINWOOD.—Let me ask the witness a question. Mr. Cox, this installation that you are speaking of was before or after the installation of the Morenci plant?

A. Before the installation?

Mr. ELLINWOOD.—May it please the Court, to make our [60*—2†] position plain in this matter, I didn't object to this question, figuring that probably it went to the qualification of the witness. That is the only purpose I could see for introducing this

*Page-number appearing at foot of page of original certified Record.

†Original page-number appearing at foot of page of Assignment of Errors as same appears in Certified Transcript of Record.

testimony. We object to any line of testimony showing the character, installation or operation of other similar plants, or dissimilar to prove this case.

The COURT.—I did not understand it was offered for this purpose.

Mr. SEABURY.—I offer it for two purposes; first, on the question of qualification on which I think it is undoubtedly competent, and second, as laying the foundation for testimony which may relate to other plants. There is no other way in which the foundation for the admission of testimony relating to other plants can be admitted. I concede it would be improper for me to ask this witness questions about other plants unless I had shown the similarity between the other plants and the plant in this case, and for that purpose I offer the evidence in addition to his qualifications.

The COURT.—I admit it only for the purpose of showing his qualifications.

Mr. SEABURY.—I except to your Honor's exclusion of it for the other purpose.

J. H. COX was further asked:

Q. Now, Mr. Cox, you have testified, as I recall it, that you have made examinations of many similar plants as that erected in this case; is that correct?

Mr. ELLINWOOD.—That went to his qualification only and we have freely admitted the qualification of the witness.

Q. I'll ask you whether in the course of your experience that you have detailed here to us, you have had occasion to examine other similar plants to this?

Mr. ELLINWOOD.—Now, we object to the question as incompetent, irrelevant and immaterial to any issues in this case.

The COURT.—I can't see the relevancy of it.

Mr. WRIGHT.—I believe, if the Court please, that if it can be shown, as we offer to show, that plants of exactly similar type operated under similar conditions, the same type, the same conditions, and producing the same results, act upon the pipes and upon engines in a manner which is not injurious either to the gas-carrying pipes or to the engines, then that will be competent evidence to show that this plant, which is the same as the other plants which have been observed by the witness will not act in an injurious manner in the gas-carrying pipes or the engines. I have authorities here to support the proposition.

The COURT.—As part of your case?

Mr. WRIGHT.—Yes, your Honor.

The COURT.—I would like to see the authorities on that. How do you think that is relevant in your main case.

Mr. WRIGHT.—If the Court please, there is a clause in the contract which provides that the gas produced shall not be injurious to either the gas-carrying pipes or to the engine.

Q. Now, we desire to show that this witness and other witnesses have in the course of their experience examined other engines of the same type, under the same conditions, and that effect was not injurious under those conditions and the inference will be that the result is not injurious in this case.

The COURT.—The qualifications of the witness

have been admitted. How you propose to show by comparison—

Mr. WRIGHT.—Yes, I am not asking for his opinion as an expert witness but rather from the facts which have been [62—4] based on his observation in other plants.

The COURT.—I don't care to hear further on the objection. The objection is sustained.

Mr. SEABURY.—We except.

ORVILLE H. ENSIGN, a witness examined by deposition, was asked:

Q. How long have you been familiar with gas-producers of the type which was erected at Morenci?

A. Ever since the first one was made.

Q. And how many of these producers have you seen in operation?

A. Five of them—five different installations.

Q. Was the gas produced by any of the five holders of which you speak cleaner or did it contain less suspended matter than the gas produced at Morenci?

Objected to on the ground that the question is immaterial, in that it makes no difference what other gas machines may have been or in what manner at all they performed their functions.

Mr. WRIGHT.—I would like to make a statement of that question before the ruling is made, your Honor. I merely want to make an offer of proof before the ruling is made. The plaintiff in this connection offers to prove that other machines of the same type as that which was erected at Morenci, operating under the same conditions, produced gas which did not contain suspended matter injurious to

the pipes or to the engines which was the same quality and kind as those owned by the defendant at Morenci and through which this gas was to be passed.

The COURT.—I guess you had better ask the questions and I will rule on them. I think that would be better than offering the proof.

Mr. ELLINWOOD.—I conceived that if the witness were on the stand that counsel might ask to prove by the witness certain things, but inasmuch as this is in a deposition, this will be governed by the answer in the deposition and perfectly preserved.

Mr. WRIGHT.—That's all right. I withdraw the offer. [63—5]

Court reads answer.

The COURT.—I sustain the objection.

Mr. SEABURY.—We except.

Mr. ELLINWOOD.—Then that will govern the subsequent question, line 21 I have it.

Mr. WRIGHT.—Would it not be better to ask the question.

The COURT.—Yes, so the reporter can get it. I don't want to be put on record as ruling on something I haven't seen or heard raised.

Mr. ELLINWOOD.—I understand this deposition is of record.

Q. Were any of the other gas-producers producing cleaner gas than the one at Morenci besides the one at El Centro?

Mr. ELLINWOOD.—I object to that.

The COURT.—The objection is sustained.

Mr. WRIGHT.—If the Court please, there was no objection made at the time.

The COURT.—Is this taken on open commission.

Mr. ELLINWOOD.—Yes, open commission.

The COURT.—Just pass on and I'll rule on it.

Mr. WRIGHT.—All this tends to the same effect.

The COURT.—It seems to me we have a statute on the subject, even where no objection is made.

Mr. ELLINWOOD.—It was taken under the Federal statute, 863, I think it is.

The COURT.—Yes, but I imagine we follow the State practice. (Reads Section 2525 of the Arizona Statutes.) The objection is sustained.

Mr. SEABURY.—We except.

Q. How long had these five producers been in operation?

Mr. ELLINWOOD.—Same objection.

The COURT.—Same ruling.

Mr. SEABURY.—Exception.

Q. Have you observed the condition of the gas-carrying pipes and the condition of the engines at El Centro, at Yuma and at the Pan-American Ostrich Farm? [64—6]

Question objected to on the ground that it is immaterial and irrelevant in this, that it tends to elicit testimony concerning other gas engines at different places and has no tendency to prove any of the issues in this case.

The COURT.—Same ruling.

Mr. SEABURY.—Exception.

Mr. WRIGHT.—Now, I understand, your Honor, that my offer of proof did not become a part of the record upon the ground that it was not made at the time of the deposition.

Mr. ELLINWOOD.—It is already here. This deposition is in the case.

The COURT.—Your offer to prove any fact or facts, by any answers contained in the deposition, was not protected, because I held that you should read the questions and objections, and if you have any other witnesses you desire to produce, you may then make that offer.

Q. What engines have you seen in operation other than these engines?

Mr. ELLINWOOD.—We make the same objection.

The COURT.—Same ruling.

Mr. SEABURY.—Exception.

Mr. WRIGHT.—The answer to that question contains some reference to his qualifications and bears upon the next question and the next question makes no sense without the part of the answer.

Mr. ELLINWOOD.—I withdraw the objection for the benefit of counsel to that question.

A. Gas engines? From a general experience in connection with developing power for over twenty-five years or more.

Q. Where have you been engaged in that experience?

A. In Los Angeles and in observation in all sorts of places. [65—7]

Q. What is the effect of the suspended matter contained in the gas produced by the other installations than the one at Morenci upon the pipes as to clogging them or stopping them up?

Mr. ROSS.—Objection. We further object gen-

erally to this line of testimony regarding the condition of other gas plants at other places, for the reason it tends to prove no issues in this case, nor is it shown that such plants were installed or operated in the manner in which the plant in question was installed and attempted to be operated? And this objection is made generally to this line of testimony for the sake of brevity.

The COURT.—In view of the testimony in this case and the law on the subject, I think that objection is a good one and I sustain it.

Mr. SEABURY.—Exception.

Q. Were the plants which you have described at other places the same type of producer as that in operation at Morenci?

Mr. ELLINWOOD.—Same objection.

The COURT.—Same ruling.

Mr. SEABURY.—We except.

Q. Were the other plants of which you speak operated under the same conditions as the one at Morenci?

Mr. ELLINWOOD.—Same objection.

Mr. SEABURY.—These questions now are tending to qualify the witness to give the testimony which has been excluded and which we think with other testimony which has been excluded in the case would have been competent. In other words, I think in order to make evidence relating to other plants admissible in this case, we have got to show that the other plants were similar, that the conditions were the same and that the general surroundings are practically [66—8] identical. We have endeavored

to show that by other witnesses and now come questions addressed to this very witness in the deposition asking him whether these things are the same or not. For the purpose of qualification, it seems to me those questions are clearly admissible.

II.

The Court erred in sustaining defendant's objection to and excluding expert testimony offered by plaintiff, by which plaintiff proposed to show that the plant in question in this action performed the functions required of it by the contract. For the purpose of eliciting this testimony, plaintiff propounded to witness L. H. Cox the following questions:

Q. Now, after this apparatus of yours was installed, are you able to say whether or not it properly performed the function of a three 200 horse-power Amet crude oil gas-producer?

Mr. ELLINWOOD.—We object to that as just the very question to be submitted to the jury. The jury is entitled to draw the conclusion that the machine did or not properly perform the function for which it was intended. This objection is supported by many cases. I have seen them particularly where in putting the hypothetical question to an expert medical witness, it is sought to put to him practically the question which is the issue in the case, and as I understand, the authorities are against such practice and require that an expert shall give his answers to hypothetical questions or his opinion, but shall not be permitted to answer upon the general issue itself.

[67—9]

The COURT.—I have some doubts upon that ques-

tion and prefer to have you give me authorities on it.

Mr. ELLINWOOD.—I haven't authorities available. I just submit this objection.

The COURT.—How else could they determine whether an engine was working well or not.

Mr. ELLINWOOD.—There are specific guaranties which this engine is supposed to meet. They say it met all of them. Now, they have attempted to prove it. They couldn't prove performance by merely asking, "Did you perform the contract? Yes, sir." Does that prove performance of the contract containing a number of specific guaranties?

The COURT.—The question is whether or not it was suitable and worked—whether it did good work and performed the duty of that type of an engine.

Mr. ELLINWOOD.—Without going into this question, let me suggest the further objection that this particular installation should be confined to the particular purpose specified in the contract. Now, it may be that this Amet gas-producing plant, as you know, has varied uses, and to ask him whether it properly performed the function of a gas-producing plant is very far from asking him whether or not it had anything to prevent its fulfilling this contract. In this particular case, the gas was intended to be used for power purposes and under certain circumstances.

The COURT.—I believe that objection is good. I have just glanced at this guaranty here. I think you should confine that question as to whether or not it performed the office herein mentioned.

Mr. SEABURY.—I direct your Honor's attention

to the fact that my question included in the first paragraph of the contract itself, which says: "The Smith-Booth-Usher [68—10] Company will furnish the undersigned three 200 horse-power Amet Crude Oil Gas Producers," and my question was whether or not the apparatus he installed performed the functions of three Amet Crude Oil Gas Producers.

The COURT.—That wouldn't be such proof as would be admissible if it didn't come up to the guaranty. That wouldn't be such proof as would be admissible—or rather that wouldn't be sufficient if it didn't come up to the guaranty of this contract.

Mr. SEABURY.—May I invite your Honor's attention to another part of the contract in question. "It is understood and agreed that any machine the company may furnish is properly to perform the duty for which it is known to be intended by the parties.

The COURT.—Whether or not it did properly perform the duty for which it was intended should be the form of the inquiry.

Mr. SEABURY.—But I am basing this question upon the theory that the purpose for which this machinery was intended must be ascertained, if at all, from the contract itself. Now, if the contract itself describes this as a three 200 horse-power Amet crude oil gas-producer, we assume that the defendant knew perfectly well from that just what that was.

The COURT.—If that were true, all a man would have to do when he makes guaranties, regardless of how many there are in the contract, would be simply

to put the witness on the stand and ask whether or not the machinery furnished, if it be machinery, properly performed the duty for which it was sold or intended. That's all the plaintiff would have to do.

Mr. SEABURY.—Assuming, of course, that the witness was qualified [69—11] and knew 200 horse-power gas-producers of the same type and knew what functions those other gas-producers performed.

The COURT.—I'll sustain the objection.

Mr. SEABURY.—We except.

Q. Now, Mr. Cox, do you know the function to which 200 horse-power International Amet crude oil gas-producers such as was installed in this case are usually and customarily put?

Mr. ELLINWOOD.—That isn't the question at all.

Mr. SEABURY.—That's the question here.

Mr. ELLINWOOD.—It is what was this engine for? What was the intention of the parties—

The COURT.—Do you object to it?

Mr. ELLINWOOD.—I do.

The COURT.—State the ground of the objection.

Mr. ELLINWOOD.—We object on the ground that it is incompetent, irrelevant and immaterial to show what is customary in an Amet-Ensign engine. It should be confined to the particular case under the contract.

The COURT.—The objection is sustained.

Mr. SEABURY.—We except.

III.

The Court erred in sustaining defendant's objection to and excluding testimony offered by the plaintiff, by which plaintiff proposed to show the circumstances existing at the time the defendant refused to go on with the contract and that plaintiff never abandoned the contract but was ready, willing and able to and did perform the terms and conditions of the contract to be by it performed. For the purpose of eliciting this testimony, [70—12] plaintiff propounded the following questions:

TO J. H. COX:

Q. Will you please tell us the circumstances under which you left Morenci at that time?

A. I think it was the night of the 6th I had a conference with the company's engineers and consulting engineer, Mr. Le Grand, and the assistant consulting engineer, Mr. Douglas. There was also present Mr. O. H. Ensign, the inventor of this process. And I had a verbal understanding with the engineers.

Q. I suggest you just state what took place; don't state the conclusion; just state what was said. State the conversation as near as you can.

A. I proposed to the engineers—

Mr. ELLINWOOD.—I object to any oral modifications of this contract. If he is going to testify to that. They haven't pleaded anything of that kind and I don't think it is within the issues.

Mr. SEABURY.—I don't understand, your Honor, that the conversation purports to constitute a modification of the contract. A contract of this

kind necessarily involves a good deal of leeway in regard to the manner and nature of its operation.

Mr. ELLINWOOD.—I agree with you.

Mr. SEABURY.—We wish to show not a modification of the contract, but a performance of the contract was discussed at that time which met the approval of those in charge of the defendant's mine there.

The COURT.—In other words, to show that they accepted the plant as completed or as it then stood?

Mr. SEABURY.—No, I wish to show what it was at that time that the defendant desired to have done and what it was that Mr. Cox said on behalf of the plaintiff he would do for [71—13] the purpose of making the plant perform the terms of the contract. As I say, not at all as to the modification of the contract.

Mr. ELLINWOOD.—In other words, admitting that it would not perform the functions, a proposition to make a different contract with the engineers of the company.

Mr. SEABURY.—That is not the proposition at all.

Mr. ELLINWOOD.—That is just the proposition.

Mr. WRIGHT.—The answer alleges that the contract on this date was abandoned by plaintiff and the conversation between Mr. Cox and the representatives of the Detroit Copper Company will explain exactly what took place there. In explaining the so-called abandonment of the contract by plaintiff, which is simply a rebuttal of one of the allegations of the answer.

The COURT.—Yes, but your witness shows that up to the time he testified that there had not been a compliance with the contract. It had not been completed and turned over.

Mr. SEABURY.—I don't understand that the witness has so testified. There has been no proof as to whether it was turned over or not.

The COURT.—He did say, did he not, that the apparatus was not complete when he left.

A. I stated that the test was not complete. There was a 90 day test.

The COURT.—Didn't you use the word "apparatus"? A. No; the test.

Mr. ELLINWOOD.—I would like to suggest in answer to Mr. Wright's suggestion that he stated that is for the purpose of rebutting what is pleaded in our answer. This should be relevant to some allegation in the complaint.

Mr. SEABURY.—I think it is part of our case, if your Honor [72—14] please, to show, to negative the possible suggestion that we ever did abandon the work, Mr. Cox's retirement from the place on the 7th of May did not constitute any abandonment of the contract at all. We wish to show that he had made arrangements to return and that that was entirely satisfactory. Now, that isn't a modification or alteration of the contract. The contract was sufficiently broad to permit such a course of conduct on the part of the parties. In other words, as I understand the contract, there was no specified time within which the work was to be turned over. The work was to be prosecuted diligently and subjected to a

90-day trial by defendant, and payment was not to be made until the end of that 90 days trial, provided it met the guaranty of the plaintiff, unless they wished to make payment voluntarily.

Mr. ELLINWOOD.—In order that the Court may be set right on this, and without introducing it at this time, I would like the witness to identify a letter here and show the court what this is leading up to and what is being attempted to be done.

Mr. SEABURY.—I object to that, if your Honor please; I don't think that is proper.

Mr. ELLINWOOD.—I would just simply like to have the witness identify this letter of his which tells this whole story. I don't wish to put it before the jury, but to hand it to the Court to show the forcefulness of our position.

Mr. SEABURY.—I respectfully object to the method of procedure.

Mr. ELLINWOOD.—We object to any statement of this witness which tends to prove any modification of the contract upon which we are suing.

Mr. SEABURY.—We disavow a purpose to prove by this conversation [73—15] any modification or alteration of the contract and we offer to prove, as proof of our performance, our terms of the contract as that contract is written.

Jury excused.

The COURT.—I'll hear the witness now and pass upon it in the absence of the jury and ascertain whether or not it is admissible, in my opinion.

A. My understanding of the question as asked by Mr. Seabury was relating to why I left Morenci at

that date. My answer was leading up to the point of giving my reasons why I did leave. Is that what your question intended, Mr. Seabury? That was my understanding of it.

Q. The question really was what conversation was had between you and Mr. Douglas and the other gentleman, Mr. Le Grand that you referred to as the engineers of this company with reference to your departure; that is, as I recall, was the question.

A. Do I understand then that you want to hear that?

The COURT.—Yes.

A. The evening of May 6th or thereabout I had a conversation together with Mr. Ensign, with the consulting engineer and assistant consulting engineer regarding the plant, and they made objections that there was too much foreign matter contained in the gas, and I told them that this foreign matter could be entirely eliminated by the introduction of a mechanical washer, mechanical means of separation, and suggested to them that an engineer representative of their company, together with the representative of my company—

The COURT.—Pardon me; was that part of the apparatus which the contract provided for?

A. It isn't provided for in the contract.

The COURT.—Go ahead. [74—16]

A. That they visit a place where one of these had been installed, which was a later and newly tried means of separation, and they agreed to take it up with Mr. Thompson the next day. I had a talk with Mr. Thompson regarding this, and made him a propo-

sition that if he would send an engineer, I would send one to El Centro to see this apparatus, and it was agreed at that time that if the apparatus proved successful and was doing the work we contended it would do and thoroughly clean the gas, that I might be granted further time and the 90 days might be extended until such time as this apparatus could be installed at Morenci for the further cleaning of the gas, and then I made Mr. Thompson a proposition in writing offering to go to this expense, to do this at my company's expense in addition to what was required by the contract, but it couldn't be done within the time limit of the 90 days. Therefore, I asked for the extension and left Morenci with the full intention of returning, full expectation of having this time extended and the apparatus furnished and expected to return when it was installed to make a further test.

The COURT.—Did you return?

A. The matter took a different phase after I left and Mr. Thompson later on during the month of May notified my company that he would not proceed any further, that meaning that he wouldn't grant the extra time which it would require to install this mechanical scrubber.

Mr. ELLINWOOD.—May it please the Court, all of this is qualified by this written statement of the witness. Of course any conversation he had with our mechanical engineers couldn't bind the company. They weren't in a position to speak or act for the company and of necessity while that could be used as an admission against the plaintiff here, [75—17] because Mr. Cox was its representative, it couldn't be

used against the company, and recognizing that fact, Mr. Cox wrote a letter to Mr. Thompson at that time setting forth a great deal more, incidentally the very proposition concerning which he has testified in detail and which I wish the Court would see and offer it so the Court may see it is a complete modification of machinery and time.

Mr. SEABURY.—We object to it as not being the proper time.

Mr. ELLINWOOD.—It isn't in the presence of the jury.

Mr. SEABURY.—I understand that. We desire to show, further, the relation existing between the engineers in whose presence this conversation is alleged to have taken place, and that is done, if your Honor please, to show that Mr. Le Grand and Mr. Douglas were engineers designated in this case to work with Mr. Cox and Mr. Ensign in the operation and installation of this plant, pursuant to the contract.

Mr. ELLINWOOD.—But not to change the contract.

Mr. SEABURY.—We say there was no change in the contract.

Mr. ELLINWOOD.—But that letter shows—

Mr. SEABURY.—The letter isn't in evidence.

The COURT.—According to this witness' statement, they made the objection that there was too much lampblack and that he proposed to erect something which I cannot describe in a technical way, and then it was agreed that they send some men to Ventura, California, to examine a certain apparatus

with a view of determining whether it should be adopted and installed so as to make this plant, these units, do the work for which they were purchased, or rather to remedy the defect which was pointed out by these people.

Mr. SEABURY.—That is the point of variance, if your Honor please. Our position is this: The contract simply [76—18] provided that the suspended matter in the gas would not be injurious to the engines or gas-conducting pipes. The words of the contract were, there will be no suspended matter in the gas which will be injurious to the engines or gasconducting pipes, not that there would be no suspended matter. Our position is this: That the contract was performed even though the suspended matter existed. We will show by proof that the suspended matter which did exist in the gas was not injurious either to the engines or pipes, but the defendant objected to its presence at all, and for the purpose of satisfying the defendant as to its objections and entirely without conceding that the presence of the suspended matter constituted a breach of the contract, we wish to show this conversation and what was done pursuant to it. As I say, it wasn't enough that mere suspended matter existed, but the breach of the warranty in that respect would have to consist of the injurious effect to the pipes.

The COURT.—You mean to say that this witness' proposition to these people, while maintaining that they had complied with the contract, was simply to remedy an objection which really was not well founded, but simply to satisfy them?

Mr. SEABURY.—That is all, your Honor.

The COURT.—As to this particular objection?

Mr. SEABURY.—And also as explaining the general relations which existed between the parties showing the effort on the part of the plaintiff properly to perform the contract under its terms.

Mr. ELLINWOOD.—In other words, they are going to get something they never contracted for. If that is the case, it is perfectly immaterial what they gave the company outside; if they performed the contract; that is all there is of it.

Mr. SEABURY.—That is what we are endeavoring to show; that [77—19] we did perform the contract, and, as I have said, these conversations were had in performance of the contract, not changing the contract already made.

Mr. Ross.—If your Honor please, this contract provided for the installation of certain apparatus described here which included apparatus for cleaning the gas. Now, it has gone sufficiently far to indicate that certain apparatus was installed pursuant to this contract. The first contract, as will appear from the manufacturer's bulletin attached to the contract and made a part of it, required a vertical scrubber and to allow the plaintiff to substitute the latest improved design. So the plaintiff picked out the latest improved design, which was a horizontal scrubber and installed it. Now, that became the installation under this contract. They had the right to pick out what they would install there as a scrubber and they put it in. Now, counsel suggests that soot and suspended matter could not be material unless

it was injurious to the conducting pipes. That is simply explained by the manufacturer's bulletin also referred to. And will the Court also have in mind in connection with this, that the contract specifies as its principal condition on the part of the seller that this apparatus was—shall perform the purpose for which it is known by the parties to be intended. That is part of the language of the contract, under the head of guaranty. It is understood and agreed that any machinery that may be furnished is guaranteed to properly perform the duties it is intended for, etc.

The COURT.—What is the purpose of the evidence, Mr. Seabury?

Mr. SEABURY.—The purpose of the evidence is to show that [78—20] a tender was made by the plaintiff's authorized representatives to install a similar kind of washer, as I understand it, within the terms of the contract, and that the willingness of the defendant to permit that within the period of 90 days was dependent upon the inspection of the plant at El Centro by their own engineer Mr. Douglas. And the only reason why Mr. Cox on behalf of the plaintiff asked for further time in which to complete the plant in that particular was because of the nature of the washer at El Centro and the practical difficulties of securing one similar to that, if defendants wished it to be secured. Now, as I said, without departing from possession of the defendant company, notwithstanding the fact that the defendant failed to turn over to the plaintiff the 15,000 foot gas-holder, and was in consequence un-

able to make changes in accordance with the contract.

The COURT.—I can't see, if it is admissible at all, why it wouldn't show modification of the contract, and that has not been pleaded.

Mr. SEABURY.—It is not claimed.

The COURT.—What is not claimed?

Mr. SEABURY.—That there was a modification.

The COURT.—Then I can't—it seems to me that you ought to first show that the plant was installed according to the contract, and if there was any reason why it wasn't so installed, then you would be allowed to show the reason it was not completed within the time specified or as provided in the contract. In other words, I can't see that this is admissible for any other purpose than showing a modification of the contract. I sustain the objection.

Mr. SEABURY.—To which we except. Now, what portion of this record, if any, if your Honor please, is to go before the jury?

The COURT.—As I understand it, none at all. When the [79—21] jury returns you will ask your questions and they interpose an objection, if they have one, and the Court will rule on it. All that has taken place during the absence of the jury is inadmissible. If you want it to go in the record, you will have to ask your questions in the presence of the jury and obtain a ruling. But I thought that in the absence of the jury we might determine whether or not it was admissible without prejudicing the rights of either party.

Mr. SEABURY.—So long as it is preserved in

the record and our exception to your Honor's ruling noted; that is all I am interested in.

The COURT.—It seems to me the proper thing to do, if the question is as you want it framed and the objection is as counsel for defendant want it, when the jury returns, I just simply state that the objection is sustained, without going into all the conversation and discussion that has taken place during their absence.

Mr. SEABURY.—I suppose the stenographer could read what those questions were in order that the objection may be made without the discussion and in order that your Honor may rule upon it.

The COURT.—The questions have been propounded and the objections have been made, and now it is only left to the Court to rule.

Mr. ELLINWOOD.—I understand that the question was asked in the presence of the jury.

The COURT.—And the objection was made?

Mr. ELLINWOOD.—And the jury has no interest in the ruling of the Court.

The COURT.—No. [80—22]

Mr. ELLINWOOD.—That's all there is of it. If they want to examine the witness as to what Mr. McDougall and Douglas did, I can see no objection to that.

The COURT.—I didn't sustain it on the theory that they were not entitled to prove what was done by either of those men as agents, but as to any conversation which they may have had looking to the modification of the contract. This was objected to, and I sustained the objection on the ground that the

evidence would show a modification of the contract, or was for the purpose of showing such modification.

Mr. SEABURY.—And to that we excepted, as I recall it.

The COURT.—Yes.

Mr. SEABURY.—Then when the jury is recalled, may the question be reread and the objection made and the Court rule and the statement made that in the absence of the jury the following discussion takes place, so that this may be preserved in the record?

The COURT.—Yes.

Jury returned into court.

Mr. SEABURY.—May I have the question that was asked at the time the jury went out?

(Question read.)

Mr. SEABURY.—It appears of record that counsel have objected and the discussion had taken place in the absence of the jury and that your Honor sustains the objection; is that correct?

The COURT.—Yes.

Mr. SEABURY.—To which ruling we respectfully except.

J. H. COX was further asked:

Q. Do you know what the occasion of your departure from Morenci was?

A. The occasion of my departure was to wait the results of the inspection of both company's representatives [81—23] of the plant at El Centro.

Mr. ELLINWOOD.—That is not the occasion of his departure; that is the very matter we argued all out here. If he would ask him why he left there. What the plaintiff should prove here is that they

installed a plant and that this plant was of the type—was what the contract called for. Why he left Morenci—the only reason why he left Morenci was, I suppose, because the plant was ready to be turned over and was accepted, but to offer proof as to the occasion for his leaving Morenci is a matter which has nothing to do with the contract or any issue in the case; that is the matter we object to.

The COURT.—Now, his answer was that the occasion of his departure was to await the action of the engineer of the company and the plaintiff.

Mr. ELLINWOOD.—We move to strike it out as wholly irrelevant and immaterial to any issue in the case.

The COURT.—I think it is immaterial and I grant the motion. Gentlemen of the jury, that remark of the witness is stricken out and will not be considered by you for any purpose whatever.

Mr. SEABURY.—We except.

Q. Mr. Cox, prior to your departure from Morenci on May 7th, 1913, did you have a conversation with reference to that departure with Mr. A. T. Thompson, general manager of the defendant company?

A. I did.

Q. Will you tell us what the conversation was?

Mr. ELLINWOOD.—That is the very conversation that was argued before, and I don't know why it becomes relevant just because a different question is asked.

Mr. SEABURY.—Counsel may forget that the condition of this record is such that evidence has been taken in the absence [82—24] of the jury, and

I find it necessary to make a record that is subject to review, and I ask the question for the purpose of the preservation of the record.

The COURT.—It is almost impossible for the Court to tell whether that evidence will show a modification or not. If it was something that was discussed and something that had been eliminated at the time they were discussing this apparatus or lampblack or something else, it might be admissible. The question itself is not objectionable.

Mr. ROSS.—That is the very reason that we took the witness' answer in the absence of the jury; to see whether the matter sought to be elicited was admissible. Having found it was not admissible, then that point was supposed to be ended. Assuming that the matter now sought to be elicited is objected to and objection sustained as to the form, and which counsel avers to be the case—

Q. I have made no averment in regard to this.

Mr. ROSS.—But he says it is the same matter and he wants to make the record.

Mr. SEABURY.—I am not familiar with the method of interrogating the witness in the absence of the jury for the purpose of enlightening the Court or counsel as to the substance of his answer. If I propound a question which is not proper or competent, I believe I have the right to have it answered or ruled upon in the presence of the jury.

The COURT.—In view of counsel's statement as to the form of the question, I'll overrule the objection.

Mr. ELLINWOOD.—Does counsel avow that this

is not intended to bring out the conversation that was detailed to the Court in the absence of the jury?

Mr. SEABURY.—I don't care to make any avowal with reference to that. I am asking this witness for any conversation [83—25] he had with Mr. Thompson with reference to the witness' departure from Morenci on or about the 7th of May, 1913.

The COURT.—The objection is overruled.

A. I had a conversation with Mr. Thompson regarding the matter of an extension of the 90 day period of the try out of the plant.

Mr. ELLINWOOD.—Now, at this point, if that is the conversation referred to, we object to it as wholly incompetent, irrelevant and immaterial.

The COURT.—The objection is sustained.

Mr. SEABURY.—We except.

The conversation as it related to other matters was in relation to the plant, partially to the plant that was installed. Mr. Thompson made objection to the amount of foreign matter in the gas—contained in the gas. He said that he had been advised by his engineers that there was too much foreign matter in the gas to enable them to run continuously through long pipe-lines, or through pipe-lines, and the gas must be cleaned better than it was being done at that time.

Q. What, if anything, did you say about that to Mr. Thompson?

A. I told Mr. Thompson that by a system of sprays and sluicing this gas could be run through these pipe-lines and run into the holder and should cause no interruption of the service, but if he desired it

cleaned better than it was being cleaned, why I knew of an apparatus that had lately been tried or had been tried out since the shipment of this plant from Los Angeles, whereby the gas could be cleaned absolutely. He agreed, then, to send an engineer to inspect this plant and be governed by the report of the engineer.

Mr. ELLINWOOD.—That is the matter we have already talked [84—26] about, and we ask that that be stricken out. We would not have any objection to going into this entire matter, but since it is not pleaded that we agreed that they should have an extension of time for them to go and make a different installation, and since the issues are confined to the installation of the machinery, we object to the proposal of another and different installation being testified to.

The COURT.—Any agreement which the witness stated he had made with the engineer or with Mr. Thompson for a modification of the contract is excluded. Any conversation there with reference to the presence of suspended matter is not excluded.

Mr. SEABURY.—We desire to except to the exclusion of the portion of the evidence offered which has been excluded under this ruling, and respectfully direct the Court's attention to the fact that whatever the legal effect of this conversation may be, plaintiff claims that it is not endeavoring to prove any modification of the contract in that respect and it offers the proof which is included in the witness' last answer, not for the purpose of showing any modification of the contract, but to show an effort on the part

of plaintiff and this witness to satisfy the defendant, even with reference to matters not included within the contract and for the further purpose of showing that when Mr. Cox departed from Morenci, he did not depart as an abandonment of the work, nor did he leave it as completed and he was still within the period of 90 days at that time.

The COURT.—Very well, you may take your exception.

Mr. SEABURY.—Now, what is done with reference to the answer?

The COURT.—Why I have instructed the jury as to what portion [85—27] of his evidence could be considered and what could not be considered. It seems to me that if you had completed your contract, and this evidence is for the purpose merely of showing that you wanted to do more than you were required to do by the contract, that it is not material to any issue in this case.

Mr. SEABURY.—For the purpose of the record, I desire to respectfully except to your Honor's instructions to the jury that there is any part of this evidence thus far admitted temporarily in this case which tends to show any modification of the contract between the parties.

The COURT.—Very well.

J. H. COX was further asked:

Q. Was that all of the conversation at that time that you recall?

A. I think there was some more conversation between Mr. Thompson and Mr. Smith.

Q. In your presence?

A. In my presence regarding the cleaning of the gas.

Q. Tell us what was said with reference to that.

A. Mr. Smith asked Mr. Thompson if his engineer did not report that the gas was being properly cleaned at the El Centro plant—

Mr. ROSS.—We object to any further testimony along the line of what was done at El Centro and why we didn't allow them to make another and different installation, and ask that they confine themselves to showing that this installation was all right, this particular one. Not one they wish they had installed, but the one they did install.

Mr. SEABURY.—May I have as much of the answer as was made, your Honor, when Mr. Ross began to interrupt. The purpose is not at all what Mr. Ross suggests. It is not our purpose. The purpose of this testimony is not to [86—28] show modification of this contract. I assume we have the right to show all the surrounding circumstances existing at the time the defendant refused to go on with the contract and that is the purpose of asking the witness this conversation.

The COURT.—As to what was done at the El Centro plant, it seems to me is not material in this case and I'll sustain the objection.

Mr. SEABURY.—We except.

J. H. COX testified: I had a talk with the chemist of the defendant, Dr. Sanborn, with reference to the result of any test which he had made. The talk was in the test-room adjoining the plant and on several different occasions during this time between my ar-

rival and departure from Morenci. The chemist's name I refer to is Dr. Sanborn. I understand he was the chief chemist of the defendant company at that time.

Q. Now, will you please tell us what the conversation was?

Mr. ELLINWOOD.—Now, we object, may it please the Court, as hearsay testimony. Any statement Mr. Sanborn might have made would not bind the defendant.

The COURT.—The objection is sustained.

Mr. SEABURY.—We except.

Mr. Thompson advised me that Mr. Sanborn was there for the purpose of making the test. Mr. Thompson so advised me very soon after my arrival at Morenci.

Q. Now, we ask you again to state the conversation you had with Dr. Sanborn on that subject.

A. May I answer that question?

Mr. ELLINWOOD.—Same objection to the question.

The COURT.—I haven't heard any objection.

Mr. ELLINWOOD.—We object on the same ground. [87—29]

The COURT.—The objection is sustained.

Mr. SEABURY.—We except.

J. H. Cox was asked on cross-examination.

(By Mr. ELLINWOOD.)

Q. Do you know, Mr. Cox, of your own knowledge, whether at any time from the starting of the plant on the 27th of March, to the 6th of May, it produced gas of at least 190 feet B. T. U. low value for

each gallon of oil fired, quality uniform within a range of 5 B. T. U.?

A. I don't positively, further than the chemical analysis shown me by the chemist who was making the test. I was in the room when one of the tests were being made and saw him write down his figures.

Mr. ELLINWOOD.—That's all.

Redirect Examination.

(By Mr. SEABURY.)

Q. Now, what figures did you see him write down?

A. I saw him write down the figures of the chemical analysis showing the—

Mr. ROSS.—We object to that. We asked him whether he knew or not and he said he didn't know, except hearsay knowledge of it. Now, counsel is asking for his hearsay knowledge. It is incompetent.

Mr. ELLINWOOD.—Another thing, he said there was figures and I presume he would have to produce the figures.

Mr. WRIGHT.—Is that the ground of the objection that the figures should be produced?

Mr. ELLINWOOD.—It is one; we will produce all we have got with pleasure.

The COURT.—I think the objection is a good one. I sustain it.

Mr. SEABURY.—We except. [88—30]

At the time I saw the expert of the defendant make this analysis I made some figures and wrote down some of the alleged analysis disclosed to you by the expert of the defendant, not all. I have two memoranda of these figures which I made at that time.

They are in my possession. I copied the figures as given to me by the chemist and made the figures myself. Dr. Sanborn was the chemist.

Q. Now, if you have a memorandum of those, I wish you would produce it, and I ask you, whether by reference to that memorandum, your recollection is refreshed as to the detailed statement of the analysis made to you at that time by Dr. Sanborn.

Mr. ELLINWOOD.—We make the same objection, as hearsay. We tested this witness' personal knowledge. Now, upon that basis they seek to ask him hearsay. Dr. Sanborn is here, if they want to call him as a witness.

The COURT.—I sustain the objection.

Mr. SEABURY.—Exception.

IV.

The Court erred in sustaining defendant's objection to and excluding expert testimony offered by the plaintiff by which plaintiff proposed to show the tests made of the plant in question, the reason why the test made by plaintiff was made in the way it was made, the result achieved by the tests and the difference due to defendant's failure to furnish 15,000 foot gas-holder. For the purpose of eliciting this testimony, plaintiff propounded the following questions:

TO J. H. COX:

Q. Do you know whether the apparatus installed by your company for the defendant company at Morenci when working within [89—31] 90 degrees of its normal rated capacity of 600 horse-power and using asphaltum base crude oil, ranging from 14

to 18 degrees Baume, reduced to 60 degrees Fahrenheit, containing not less than 18,500 B. T. U. per pound and weighing approximately 7.8 pounds per gallon, delivered at least 415 cubic feet of gas of at least 190 B. T. U. low value for each gallon of said oil?

A. I would say that I don't know, but I would like to qualify that with a statement of why. As to what I do know about it, there was provision only made for testing one producer, three units could not be tested to their full capacity. That is the 90% of the 600 horse-power. The only way that I could arrive at that would be of testing one unit and multiplying that by three.

Q. Will you tell us why the full test could not be made?

Mr. ELLINWOOD.—We object to it. It is alleged here that this machine was in all respects in accordance with the contract. They are going to show if it was not in the contract, it is by reason of something not disclosed in the pleadings. The allegation is that it met the guaranty. Let it be proved that they did.

Mr. SEABURY.—The reason is because they failed to supply us with the full 15,000 foot gas-holder.

The COURT.—Did you allege in the complaint that they failed to furnish it?

Mr. SEABURY.—We say in paragraph 4 of page 9 of the amended complaint that by the terms of said contract (reads). It seems to me we ought to show what that refusal consisted of.

Mr. ELLINWOOD.—They claim that the machine

was perfect and worked.

Mr. SEABURY.—The contract contains the portion of the question which I have read to the witness.

[90—32]

The COURT.—Yes, I followed you in the reading of it.

Mr. SEABURY.—And that apparently is the term of the contract we are required to meet. Now, an essential part of the term involved the supplying by the defendant of the 15,000 foot holder which we claim it never supplied and for that reason we are obliged to approximate that result and to show that result was achieved.

The COURT.—It seems to me you should have pleaded it.

Mr. SEABURY.—We did plead, your Honor, that they had failed to supply us with the 15,000 foot gas-holder which, as I recall their pleading, they deny. Is it necessary for us to get out the detail and minute effect of their failure in that respect? We do not so understand it. We thought it was sufficient for us to allege as we did. We are now trying to prove their failure and the natural result of that failure.

Mr. ROSS.—In paragraph 6 of the amended complaint, it is alleged that the trial run of the machinery took place on the 27th of March and that the machinery met all the requirements. This is one of the specific guaranties set out in the guaranty. Now, it is claimed maybe it did not meet the guaranty and we are trying to show why it didn't. The witness says he don't know whether it did or not.

Mr. WRIGHT.—If the Court please, we desire to

show that the failure to furnish the holder prevented us from making the tests in exactly the same manner in which they were to be made under the contract, but we will show that the gas was of the same quality required by the contract in every particular. We are prepared to sustain that allegation of the complaint. But we didn't make the tests in the way the contract called for because there was no holder out of [91—33] which to take the samples to make the test. For that reason we have to show that the test was made in a slightly different way and that is the statement the witness is about to make.

The COURT.—I think you should have pleaded it.

Mr. SEABURY.—It is not a question of fulfillment of the contract.

The COURT.—No, it is an excuse for not fulfilling it.

Mr. WRIGHT.—No. If I may interrupt the Court to show that there was no provision that we should fulfill the contract in that detail. We have fulfilled the contract in making gas that met every requirement and we are prepared to show that and we are trying to show that now.

The COURT.—If you have done that, why is this evidence material?

Mr. WRIGHT.—If your Honor please, for the purpose of showing how the tests were made and showing how this witness determined that the gas was of the quality required by the contract. I don't believe, your Honor, that we can say the effect of this machine was to produce gas such as required by the contract between plaintiff and defendant. But I

do believe that he can say that we produced gas of such and such a quality, and show how he found that out.

Mr. ELLINWOOD.—We are trying to find out if he knows the quality of the gas produced. If this witness made this test that is what we want to know.

The COURT.—I'll sustain the objection to the question as framed.

Mr. SEABURY.—We except.

Q. Mr. Cox, as I understand it, you are not a chemist, are you?

A. I am not. However, I have seen chemical analysis made. I have a general understanding of the process by which they are made. I wouldn't know whether it [92—34] was correct or incorrect. I believe I saw every test Dr. Sanborn made; every analysis he made.

Q. Does the analysis disclose anything by way of appearance from which you are able to say what the value of the gas is?

Mr. ELLINWOOD.—We object for the reason that the witness has utterly disqualified himself to testify.

The COURT.—The objection is sustained.

Mr. SEABURY.—We except.

Q. Would there be any difference in the consistency of the quality of gas after passing through the 1500 foot holder and the 15000 foot holder?

Mr. ELLINWOOD.—We object to that, there has been nothing shown yet about what qualities this gas had, whether it was consistent or inconsistent. I don't understand why it should be part of the

plaintiff's trouble here to explain away an inconsistency which has not yet been shown. I believe this witness testified there was exact and definite methods of getting at these things. Now, he asked him if there would be a less or greater consistency or flow from one holder as against another one. I don't know that would be relevant to the case and we object to it.

The COURT.—The objection is sustained.

V.

The Court erred in sustaining defendant's objection to and excluding expert testimony offered by the plaintiff, by which plaintiff proposed to show the harmless effect of the suspended matter in the gas generated by the plant in question. For the purpose of eliciting this testimony plaintiff propounded the following questions: [93—35]

TO J. H. COX:

Q. Now, do you know from your practical experience what if any effect the existence of suspended matter in such quantities as you found in this particular gas would have, either upon the engines or the pipes conducting the gas?

A. It would have no ill effects upon the engines. It would have no injurious effects upon the pipe, but without a system of sluicing or cleaning the pipes, it might, after a period, cause the pipes to become clogged.

Q. Would the removal of the suspended matter to which you have referred consist of anything except the ordinary cleansing of the pipes or place where the suspended matter deposited itself?

Mr. ELLINWOOD.—We object to that. The contract and exhibit attached to it point out that this process which they are going to install should be sufficient to clean the gas so there would be no deposit in the pipes. It does not provide there should be any sluicing of the pipes after they were put in there.

The COURT.—The objection is sustained.

Mr. SEABURY.—We except.

VI.

The Court erred in overruling plaintiff's objections to the following questions propounded by the defendant on its cross-examination of plaintiff's witnesses and in admitting the evidence evoked by said questions and in denying motion to strike out said evidence, upon the ground that said questions and evidence were not proper cross-examination, were immaterial and incompetent, were an indirect method of avoiding a ruling previously made on the same evidence by the Court, that no proper foundation has been [94—36] laid for the impeachment of plaintiff's witness, that said evidence was inadmissible under the pleadings, that all negotiations made by the parties were merged in the contract which is in evidence and that the evidence tended to vary a written contract which is in evidence, as follows:

TO J. H. COX:

(By Mr. ELLINWOOD.)

Q. Mr. Cox, what is the physical condition there at Morenci in the immediate vicinity of where this gas plant was installed?

A. The physical condition? As to just what do you allude?

Q. The topography of the country and the objects which you see there.

Mr. SEABURY.—We object to that as being improper cross-examination.

Mr. ELLINWOOD.—I don't think it is. He has stated it ran over to the concentrator; it was to operate engines in connection with the concentrator. I wish to show the general condition there.

The COURT.—I think it is proper cross-examination. The objection is overruled.

Mr. SEABURY.—We except.

A. The plant was installed on a level piece of made land, below the old gas plant and the mill, as I remember was slightly, is slightly higher than the level of the gas plant as installed. Just how many feet, I couldn't say. I couldn't be positive that it is higher. I had no way of judging only just from my observations.

Q. Is it not across a small canyon or arroya from the gas plant?

Mr. SEABURY.—We urge the same objection, your Honor.

The COURT.—Same ruling.

Mr. SEABURY.—We except. [95—37]

A. I don't recall any arroya between the gas plant and the mill, except there's one low place that is bridged over on the railroad track, if it might be called an arroya. There is a slight depression in the earth's surface there.

Q. And approximately what distance was the in-

stallation of this gas plant from the engines of the concentrator?

Mr. SEABURY.—We make the objection same as before, your Honor.

The COURT.—Objection overruled.

Mr. SEABURY.—We except.

A. I don't see how I could even approximate that, as that question didn't arise and I had no reason to even take it into consideration. I should say then approximately a thousand feet. The gas plant that the company was using at the time we took these negotiations up with the mining company in reference to the installation that we made was on the sidehill just above the installation that I did make.

Q. And from what is the gas made there or was it at that time?

Mr. SEABURY.—We object to it as wholly immaterial and incompetent.

Mr. ELLINWOOD.—It is material for this reason. The witness was asked if he participated in the negotiations leading up to this purchase and installation of this plant and then was asked what it was for, the purpose of operating the engines at the concentrator, and explaining the plant then in operation so that if there was any objection in the first place to this, does it matter? Certainly the door is open by which we can show these negotiations and what was the intention of the parties.

The COURT.—The objection is overruled. [96—38]

Mr. SEABURY.—We except.

Mr. SEABURY.—I desire to add to my objection,

if your Honor please, that the question is entirely beyond the scope of the direct examination and on an issue which is apparently collateral to the real issues in this case and as such is not proper cross-examination.

Mr. ELLINWOOD.—He asked if he knew the purpose for which this was intended.

The COURT.—I overrule the objection.

Mr. SEABURY.—We except.

A. I understand it was made from anthracite coal.

Q. Mr. Cox, do you *know*? The evidence is worth more if you know, rather than understand.

Mr. SEABURY.—I submit, if your Honor please, that there is nothing here to indicate that the witness should know.

Mr. ELLINWOOD.—I asked him if he knew.

The COURT.—He asked him if he knew.

Mr. ELLINWOOD.—If he don't know, I have got to abandon my cross-examination.

A. I could state that I do know it was made from coal, but I wouldn't be positive as to just what coal.

Q. Do you know the capacity of that plant?

A. I do not.

Q. You don't know the quantity of gas that is being produced? A. I do not.

Mr. SEABURY.—Same objection.

The COURT.—Same ruling.

Mr. SEABURY.—Exception.

Q. Do you know the quality of gas that is being produced? A. Only from hearsay.

Q. And did you know as to what suspended matter it contained, if any?

Mr. SEABURY.—Same objection. [97—39]

The COURT.—Same ruling.

Mr. SEABURY.—Exception.

A. Only from hearsay. I first went to Morenci to take this matter up with the company in the early part of November, 1912, and I was there after that in consultation with Mr. Thompson once before I went to the installation.

Q. And you sought to install a plant producing gas from crude oil to supplant the process that they were then using with the hope on your part and their part that it would be more economical for them to make gas from your machine, from crude oil, than from coal, is that not the fact?

Mr. SEABURY.—We object to that as not proper cross-examination.

The COURT.—The objection is overruled.

Mr. SEABURY.—We except.

A. I didn't understand that it was to supplant their present plant; as I understood, their present plant was much larger in capacity than the one I was attempting to install. If your plant was a success, in the course of time would be enlarged and supplant the entire plant. I did hope for this result.

Q. So that you were going to sell them a plant to take the place of the plant then in existence, if it proved satisfactory?

Mr. SEABURY.—Same objection.

The COURT.—Same ruling.

Mr. SEABURY.—Exception.

A. I was going to make an effort to do so.

Q. That was what you did make an effort to do, wasn't it? That was the aim and object of your efforts in Morenci?

Mr. SEABURY.—We object further, if your Honor please, upon the ground that this type of evidence tends to vary the [98—40] terms of a written contract which is in evidence in this case.

Mr. ELLINWOOD.—May it please the Court, I think it sustains the contract and shows the intent of the parties.

The COURT.—Overruled.

Mr. SEABURY.—We except. May it please the Court, may we remind your Honor of one feature?

The COURT.—Yes.

Mr. SEABURY.—Your Honor will recall my first question related to the contents of the contract and when I was unable to prove by the witness what the function of this machine was as stated in the contract, then and not until then—when that effort had failed on my part, did I seek to prove by this witness what he was supposed to know about the purpose for which the contract was entered into, judging from negotiations which were made prior to the contract itself.

The COURT.—I understand this is right along that same line.

Mr. SEABURY.—All I asked for, your Honor and all, I believe he had testified to were the negotiations immediately prior to the making of this contract. The contract is dated December 2d, 1912, and these other alleged interviews took place at an early

period; how much earlier I don't know, but I think it is too remote.

Mr. ELLINWOOD.—The witness testified he knew what the purpose of the erection was; what it was intended to do; the function of this machinery; he participated in the negotiations.

The COURT.—I overrule the objection.

Mr. SEABURY.—Exception.

Mr. ELLINWOOD.—Will you gentlemen please give me the letter of Mr. Thompson to you of November 25th, 1912, reply [99—41] of Mr. Thompson to the Smith-Booth-Usher Company?

Mr. WRIGHT.—The correspondence I have here in regard to this matter doesn't date back any further than January, 1913.

Mr. ELLINWOOD.—Then you aver it is without the jurisdiction of the court?

Mr. WRIGHT.—It isn't here.

Mr. ELLINWOOD.—It is without the jurisdiction of the court. This letter was called to my attention during these negotiations.

Q. And that is November 25th, 1912; then you understood at that time from this letter of Mr. Thompson as follows:

Mr. SEABURY.—We object, if your Honor please, to any statement incorporated in this question being read from the letter itself upon the ground that the letter is not in evidence and has not been identified by any proper reference to it and is otherwise improper for the purposes of cross-examination.

Mr. ELLINWOOD.—He says this letter was

called to his attention, this letter from Mr. Thompson, and I want to ask him if he then understood this was the objection of the installation.

Mr. SEABURY.—In other words, counsel concedes he is about to read from a portion of a letter he has in his hand. We object to it as not proper cross-examination. I call your Honor's attention to the fact that we had a similar letter in a case previous to this and after the damage was done, it was finally excluded.

Mr. ELLINWOOD.—He asked him about the negotiations leading up to the matter. Here's a letter during the period of negotiations which is written by the general manager of the Detroit Copper Company to the Smith-Booth-Usher Company telling them what they wanted it for; what the intentions [100—42] of the parties were and called to the attention of this man on the ground; the witness on the stand.

The COURT.—I sustain the objection to it for the present. Counsel for the plaintiff went into the question of intention and there was no ambiguity in the contract, apparent at this time, and it was offered without objection. I sustain the objection to it for the present.

Mr. ROSS.—Note our exception.

Mr. ELLINWOOD.—We will offer it later.

Q. I would like to ask you, as a matter of fact, Mr. Cox, if it was not a fact that the company was there operating a gas-producing plant and that your proposition to them was to make gas from crude fuel oil and to have the plant tested out by a

90-day run, and if the same proved satisfactory, that is, in giving more satisfactory results than the plant that they were working, they should buy your plant after 90 days trial?

Mr. SEABURY.—I desire to interpose an objection to the question, but before I do so I would like to ask counsel if it is not a fact that he read a portion of the letter into the question?

Mr. ELLINWOOD.—I have framed my question from some of the things in the letter, but I am asking it as a matter of fact.

Mr. SEABURY.—I object to it on that ground and upon the ground that that is only an indirect method of accomplishing what your Honor has just ruled against, and also upon the ground that such, if any negotiations were had between these parties at this time were merged in the contract, which is Plaintiff's Exhibit 1.

The COURT.—It seems to me that the latter part of the [101—43] objection is a good one.

Mr. ELLINWOOD.—We are trying to arrive at what the intentions of the parties were. It is proposed to prove the service intended by the parties. To show what the intention of the parties were by collateral evidence is not in derogation of the contract, it is in aid of the contract. We are not trying to contradict the contract, we are trying to explain it.

The COURT.—Does the contract show the purpose?

Mr. ELLINWOOD.—Yes, to perform the functions within the intention of the parties under the

guaranty. (Reads.) "Is guaranteed to properly perform the duties which it is known to be intended by the parties hereto." And this absolutely shows what the Detroit Copper Company had in mind.

The COURT.—I'll permit the question in view of that provision of the contract.

Mr. SEABURY.—May I say, your Honor, that our contention with reference to that is that the purpose of this contract and the function to be performed by this apparatus is clearly stated in this contract—3 200 horse-power International Amet Crude Oil Gas Producer. That apparatus is described in the complaint.

Mr. ELLINWOOD.—When the intention of the parties is disclosed by correspondence between the parties and brought home to the sales agent and representative there can be no question of what the intention of the parties were as to the duties it was to perform.

The COURT.—I overlooked such provision of the contract. I overrule the objection.

Mr. SEABURY.—We except. May it be understood that this same objection will extend to this type of examination?

The COURT.—Yes. [102—44]

Mr. SEABURY.—And our exception.

A. It was understood. Or rather I understood that they were operating a plant, a gas-producer plant.

Q. Repeat the question to the witness.

A. That was such a long question and it had several meanings and several answers.

The COURT.—Read the question to the witness.

A. Yes, it was understood.

Mr. SEABURY.—We move to strike that out, if your Honor please, upon the ground that that answer does absolutely tend to vary and contradict the terms of the contract in this suit. In other words, the answer would tend to indicate this was not a contract at all, but a mere option.

Mr. ROSS.—It says that if the plant does not come up to the guaranty, that it shall be dismantled at the expense of the plaintiff and removed. To that extent it is an option. If the plant were to perform all of the guaranties, it would leave no option on our part.

Mr. SEABURY.—That is the difficulty, if your Honor please, with that type of construction of that contract. It seems to me that the protection of the parties absolutely requires that the items be confined to the limits of the contract itself.

Mr. ELLINWOOD.—Counsel is seeking protection of the plaintiff and not of both parties to this contract.

Mr. SEABURY.—I think not. If the defendant required protection in that respect, I think it was clearly its duty to insert in the contract such provisions as it wanted.

Mr. ELLINWOOD.—That provision there was just about what was wanted.

Mr. SEABURY.—Under that construction I should think it might be. [103—45]

The COURT.—Now it seems to me that your question should be confined to the intention of the parties

at the time they entered into the contract.

Mr. ELLINWOOD.—Except that it is best to show it was intended by the parties to give better results than the plant that they then owned and were operating. That was the intention of the parties.

The COURT.—I sustain the objection and exclude the answer and the question as formed.

Mr. ELLINWOOD.—Note our exception.

The COURT.—I think it goes beyond ascertaining what the intentions of the parties were at the time the negotiations were made and tends to vary the written contract sued upon.

Mr. SEABURY.—We move to strike out, if your Honor please, all the testimony of this witness thus far given in response to questions of Mr. Ellinwood along those lines relating to the functions which the parties intended the producer to have at the time the negotiations were made. Relating to the intentions which the parties are supposed to have had at the time the negotiations were made.

The COURT.—No, I decline to do that. I sustain the objection to the question and I exclude the answer to the long question which was framed awhile ago.

Mr. SEABURY.—We respectfully except, your Honor.

Q. The object of this installation of the plant was to produce gas of a commercial value to operate the concentrator mining machinery of the defendant? [104—46]

Mr. SEABURY.—We object to it, if your Honor please. The object and purpose is clearly set forth

in the contract itself, the contract containing no reference to the concentrator of the defendant.

The COURT.—The objection is overruled.

Mr. SEABURY.—Exception.

A. Yes.

Q. With economy?

Mr. SEABURY.—Same objection.

The COURT.—Same ruling.

Mr. SEABURY.—Exception.

A. With economy of course.

Q. With greater economy than the production of gas by the old plant from coal?

Mr. SEABURY.—We object, if your Honor please, upon the ground that there is no such guarantee in the contract; on the ground that the evidence tends to put into that contract such additional requirements which plaintiff is not bound at all to perform and on the ground that it is improper cross-examination.

The COURT.—The objection is overruled.

Mr. SEABURY.—We except.

Q. If these gas-holders were used exclusively for your use, what would have been the result as to the operation of the mine plant during this period?

Mr. SEABURY.—We object to it as incompetent, irrelevant and immaterial, it is not material what the result would be. We claim the contract required the defendant to supply plaintiff with a 15,000 foot-holder for the purpose of testing the gas. Mr. Ellinwood asks what the effect would have been on the mining operations. It is immaterial what effect it would have had. [105—47]

Mr. ELLINWOOD.—We are trying to arrive at the intention of the parties under the contract with reference to this holder. It is the purpose of this question to show that during this period of experiment, when the gas of the plaintiff was turned into the large holders, if this had been turned over to them, it would have shut down the plant entirely, the operations of the Detroit Copper Co. and certainly that never could have been the intentions of the parties.

Mr. WRIGHT.—I refer the Court to page 4 of the contract, the purchasers agree to furnish, among other things, a 15,000 foot gas-holder? On page 3 of the contract under the company guaranty, in which the quality of the gas, the amount of suspended matter to be contained in the gas, the following clause is found: “samples of gas to be taken from main, after leaving holder.” What holder does that mean? The holder described in the contract and the holder the defendants were to furnish. It was certainly within the contemplation of the parties on the face of the contract that a 15,000 holder was to be furnished in order that any test could be made.

Mr. ROSS.—This witness has stated on direct examination that the quality of that gas after leaving the 15,000 foot holder and 1500 foot holder, there would be hardly an appreciable difference in suspended matter. They claim here the only method of finding out is by using a 15,000 holder. He has stated on his direct examination that the difference between the 1500 and 15,000 foot holder, as far as test pur-

poses is concerned, was immaterial.

The COURT.—The objection is overruled.

Mr. SEABURY.—Exception.

A. As to the result of the main engines at the power house, [106—48] I couldn't answer; I don't know what that result would be, but as to the result of the other, if the gas were furnished to that holder, would go on to the mill engines, the engines might be kept running with the gas from that holder.

Q. Do you contend that during the period between the 27th of March and the 6th of May, that the plant of the defendant could have been run with the gas that you produced?

Mr. SEABURY.—We object to it as immaterial and not proper cross-examination.

The COURT.—The objection is overruled.

Mr. SEABURY.—We except. May I add a further ground of objection?

The COURT.—Yes.

Mr. SEABURY.—Upon the ground that there is nothing contained in the contract which requires the apparatus furnished by plaintiff to run any particular engine or plant of the defendant not contained within the contract.

The COURT.—Very well.

A. The engines could have been run on the gas while the gas was being made. Between the 27th of March and the 6th of May gas was being made by our plant. Approximately eight hours per day, except the days in which we were making the changes on the washers.

Q. How much time did you expend in making the

change on the washers did you say, ten days?

Mr. WRIGHT.—May it please the Court, the contract provides that the whole period of 90 days subsequent to the completion of the erection of the plant was the period in which the plaintiff might make such an adjustment as might be made, and it is totally immaterial what part of the time was taken up with those tests. That was one of the purposes of the 90 days' trial, to allow adjustments to be made. [107—49] The changes were made during the time. The contract specifically states that. It is totally immaterial what portion of that time was taken up with those changes. We object to it on that ground.

The COURT.—Overruled.

Mr. SEABURY.—We except.

A. Approximately so; I don't remember the exact number of days. These adjustments of which I have been testifying were completed sometime near the last of April; I don't remember the date, about the 25th of April, 26th, approximately.

Q. About the 6th of April, did you have a conversation with Mr. John McDougall and Mr. George Douglas at the plant that you were erecting, in which you said that you were unable to go further with the plant and asked them, as representatives of the Detroit Copper Company to take the same over and experiment with it themselves?

Mr. SEABURY.—We object to that as being incompetent and immaterial, improper cross-examination, no proper foundation having been laid for the impeachment of the witness, and not being a proper

subject of impeachment.

Mr. ELLINWOOD.—The purpose of the question is to direct his attention to the time and place of the conversation. Now, may it please the court, the counsel in his argument repeatedly stated this was the authorized representative of the company and the one we were doing business with. There is no question about that.

Mr. WRIGHT.—If you will recall our statement, your Honor, Mr. Cox went to Morenci for the purpose of testing this plant which had been erected prior to his arrival, but had no authority from this plaintiff to make any changes or any modification of any agreement, or to change the conditions under which the contract was to be performed. He was there simply [108—50] for the purpose of making tests of that plant and further than that, nothing has been shown in evidence.

Mr. ELLINWOOD.—May it please the Court, I am thoroughly astonished at the statement of the plaintiff's counsel, after a solemn statement of counsel, Mr. Seabury that he was the authorized representative of the company. That has been the theory of the case from start to finish.

Mr. SEABURY.—I have no recollection of making any such statement.

Mr. ELLINWOOD.—Well, it is in the record.

Mr. SEABURY.—There is no doubt, if your Honor please as to the witness' authority to go there and make an adjustment.

Mr. ELLINWOOD.—If this witness has testified that this plant is complete and performed the func-

tion for which it was contemplated and then has made statements such as I shall interrogate him about, it is very material in this case.

The COURT.—It will be admitted for the purpose of going to the witness' credibility only.

Mr. SEABURY.—We respectfully except to its admission for any purpose.

The COURT.—Very well. Answer.

Q. I am asking you if you had such a conversation—I'll state it is susceptible to a very brief answer.

Mr. SEABURY.—We think that where counsel assumes to state what the conversation was, he cannot be expected to answer yes or no.

The COURT.—Can't he say yes or no.

Mr. SEABURY.—If he says yes, then he is bound by the alleged conversation as stated by Mr. Ellinwood. There may have been a conversation and it must have been exactly as stated by counsel. [109—51]

The COURT.—Then he can state no. Or if he desires to qualify or explain, I instruct the witness he has that privilege.

A. I had a conversation on or about that date with these gentlemen as I did almost every day, but the conversation related to this: I stated that I couldn't make the gas cleaner than I was making it at that time and they insisted that the gas be made cleaner, and I told them that they might have the privilege of trying it themselves, if they wanted to try to make it cleaner, but with the present apparatus, I could make it no cleaner than I was doing at that time. That statement now is the conversation as I remember

it that took place at that time. My conversation is the conversation that really took place. It wasn't verbatim the conversation which you stated.

Q. Now, I'll ask you if you had a conversation, Mr. Cox, with Mr. Le Grand about this same time and place, concerning this small holder in which you said to Mr. Le Grand that you would like to have a holder to connect with the plant so as to get a steadier pressure and also to give you the means of measuring the quantity of gas?

A. I made that request several times.

Q. Did Mr. Le Grand ask you if the small holder would be all right to which you said it would be satisfactory?

Mr. SEABURY.—We object to it as beyond the scope of cross-examination.

The COURT.—Overruled.

Mr. SEABURY.—Exception.

Q. At that time and place did you state to Mr. Thompson that you had done everything you could in connection with the plant as it stood and saw no use of staying there longer?

Mr. SEABURY.—We object to that, if your Honor please, as to form, inadmissible under the pleadings and not proper cross-examination [110—52] and being exactly similar in character to the questions already framed by counsel, which as I recall it, your Honor sustained the objection to.

The COURT.—The objection is overruled.

Mr. SEABURY.—We except.

A. Am I to answer that yes or no.

The COURT.—If you can you are. If you can

you can make any explanation after answering it. I cannot tell you how you are to answer questions, except that you ought to answer it as asked, if you can, if not, state why.

A. I did state to Mr. Thompson that I was unable to wash the gas any cleaner than I was doing at that time; that there was no use for me to stay during the interval of the engineer's trip to inspect another plant.

Q. Then didn't Mr. Thompson state to you or ask you if you claimed you were making a satisfactory gas as far as the soot was concerned and you stated to him that you were not?

Mr. SEABURY.—Same objection, if your Honor please.

The COURT.—Same ruling.

Mr. SEABURY.—We except.

A. I said to him that I couldn't make it any cleaner than I was at that time.

Q. Did you state as I have put the question to you?

A. Not exactly so.

Q. Didn't you then say to Mr. Thompson that you wished to install a mechanical or rotary washer which you knew would clean the gas?

Mr. SEABURY.—We make the same objection, if your Honor please, particularly as to the form of the question. We see no reason why counsel should not ask the witness what if any conversation he had.

Mr. ELLINWOOD.—I've got to lay the foundation. [111—53]

Mr. SEABURY.—We don't understand that it requires counsel to state the substance of the alleged

conversation, nor do we understand that it will be proper later for counsel to contradict the witness in that regard.

The COURT.—That is one of the rules laid down by the Supreme Court of the United States in the cross-examination of a witness, to lay the predicate for impeachment and it is upon that theory that I am admitting this.

Mr. SEABURY.—As I recall it, on direct examination we tried to get from this very witness statements or the substance of this very conversation he had with Mr. Thompson prior to his departure from Morenci, and my recollection is that it was all excluded so that this matter now is beyond the scope of the cross-examination.

The COURT.—I don't recall that evidence along this line was excluded; that is evidence of conversation between this witness and Mr. Thompson.

Mr. SEABURY.—I may be in error in regard to that, but my recollection was we had asked it and it was excluded.

The COURT.—As I remember it, the evidence excluded was evidence objected to upon the ground that it sought to vary the terms of the written instrument.

Mr. SEABURY.—I think I asked the witness what were the surrounding circumstances connected with his departure from Morenci and certain conversations and I was under the impression that this has been kept out.

The COURT.—The objection is overruled.

Mr. SEABURY.—Exception.

A. I did.

Q. A plant of this size required a 15,000 foot gas-holder?

A. It should have a good large holder. As to just what it requires that would be merely a matter of opinion. [112—54]

Q. Well, I am asking for your opinion.

Mr. SEABURY.—We object to it, if your Honor please, upon the ground that the requirements of this case are fixed and determined by the contract.

Mr. ROSS.—The contract doesn't say that you shall have a holder for making certain tests. The contract says we shall furnish a 15,000 foot holder. Just as you say you furnish a concentrator or piping or producer. It is plain that there was a 15,000 foot holder there. Of course counsel assumes that that was to be furnished for testing purposes.

The COURT.—I shall overrule the objection.

Mr. SEABURY.—We except.

The COURT.—Answer the question.

A. I don't believe I could state whether it would actually require it or would not.

This plant, the three units, in regular operation, would approximately make 36,000 cubic feet of gas per hour, if it worked up to its full requirements. It would depend, of course, on the value of the gas. If the value is all right, it would. That would fill a 15,000 foot holder more than about twice every hour of operation. The function of the holder is for storage purposes, one of the functions. There must be a holder of sufficient capacity to carry the plant at the time of burn outs on the producer. This

holder then would approximately carry for a half hour.

Q. Do you regard that as of sufficient storage capacity if you were getting a holder for storage purposes?

Mr. SEABURY.—We object to it as immaterial.

Mr. ROSS.—It goes to the whole point. The contention of plaintiff here is that we have in some way hurt them by failing to let them experiment with a 15,000 foot holder over there. [113—55]

The COURT.—The objection is overruled.

Mr. SEABURY.—Exception.

A. It would depend entirely upon what this storage—for what purpose this storage was—the storage necessary in this case, I would consider would be to carry over any period which it might be necessary to shut off one or two or all three of the units. It is a reserve and I wouldn't consider it a storage capacity. It is a reserve capacity. Its purposes are principally other than storage. I do not know the approximate weight of that 15,000-foot holder. I do not know the approximate weight of a 5,000 foot holder.

Q. Are you familiar with the provision of the contract which says: "That in addition to the producers and auxiliaries which would ordinarily be installed inside the power plant, space will be required outside the building for a small gas holder. The weights of these holders will range from 3,500 lbs. for 100 horse-power to 13,500 lbs. for 400 horse-power." Are you familiar with that statement in the bulletin?

Mr. SEABURY.—We object to it as improper

recross-examination and on the further ground that the typewritten part of the contract will be the controlling feature in the contract, and that that particular part of the contract specifies exactly what holder shall be provided and in what way tests shall be made.

Mr. ROSS.—I presume that specifications in the plant will be looked to as determining what the intent of the parties was.

Mr. SEABURY.—We get back to the same proposition that if we are to look to that we are also to look to the contract itself. If we look to the contract itself, we see it is a 15,000 foot holder and the tests are to be made out of the holder. Go back to the bulletin we have the same proposition [114—56] whether or not the contract itself or the bulletin will be the prevailing feature in determining the intention of the parties.

The COURT.—I overrule the objection.

Mr. SEABURY.—We except.

A. I know that that statement is in the bulletin. I do not know the weight of a 15,000 foot holder or of a 5,000 foot holder.

Q. When you specified a 15,000 foot holder, what particularly made you pick out a 15,000 foot holder?

Mr. SEABURY.—We object to it as inadmissible, incompetent and not proper cross-examination.

Mr. ROSS.—It may not be proper recross-examination.

The COURT.—I think you were allowed to ask similar questions on direct examination.

Mr. SEABURY.—I intended to ask only one ques-

tion on my redirect examination and that was as to value.

The COURT.—I didn't know that you confined it to that one question.

Mr. SEABURY.—I'll withdraw it as to not proper recross-examination, but urge the objections made in addition thereto.

The COURT.—The objection is overruled.

Mr. SEABURY.—We except.

A. Mr. McDougall told me that he would furnish a 15,000 foot holder, that was the reason that that size was mentioned.

VII.

The Court erred in overruling plaintiff's objections to the following questions propounded by the defendant on its cross-examination of plaintiff's witness Cox and in admitting the evidence evoked by said questions upon [115—57] the ground that said questions and evidence are inadmissible as incompetent and immaterial, improper cross-examination of said witness and as not within the pleadings, and that the said witness had no power to alter or modify the terms of the written contract between the parties in this case, and that said evidence does not relate to an installation under the contract, but merely to an effort to endeavor to satisfy the defendant in other respects, and that it had not been offered to affect the credibility of said witness that no proper foundation had been laid for the impeachment of said witness, and that said evidence was not the best evidence as to what was in a written document, as follows:

Q. I'll ask you, then, Mr. Cox, if immediately after this conference you didn't write a letter to the Detroit Copper Company of Morenci under date of May 6th, 1913.

A. I remember writing a letter to them; yes.

Q. I'll ask you if this is the letter that you wrote.

A. Yes, sir.

Mr. ELLINWOOD.—I now offer this in evidence. (Defendant's 6 for identification.)

Mr. SEABURY.—We object to the offer, if your Honor please, upon the ground, first, that it is inadmissible as cross-examination of this defendant. Second, upon the ground that there is no authority or power in this witness to change, alter, or modify any of the terms of the written contract by the parties in this case; further, upon the ground that the statements contained in the answer do not relate to an installation as required by the terms of the contract, but is merely an effort to endeavor to satisfy the defendant in other respects, which in this connection are wholly immaterial. Those are the only grounds that have occurred to me except on the general ground that it is inadmissible under the pleadings. [116—58]

Mr. ELLINWOOD.—Pending this offer, may it please the Court, I would like to submit another letter contemporaneous with this.

The COURT.—Is it your idea that you may at this time introduce evidence?

Mr. ELLINWOOD.—I think I can if it will contradict his statement.

The COURT.—Any written instrument, any letter

which he may have written, introduce it at this time as part of your case?

Mr. ELLINWOOD.—I think so as part of the cross-examination, whether it would be oral or whether it would be written. I might read that to him and ask him if he didn't write such and such a letter and he would say yes. Before I go further I would like to offer another letter.

A. I see a letter under date of Los Angeles, May 24, purporting to be signed by the Smith-Booth-Usher Company, S. J. Smith, president; I know Mr. Smith's signature. I think that is his signature. I would cash a check with that signature on it. This is his signature, I believe.

(Defendant's 7 for identification.)

Mr. ELLINWOOD.—Now, may it please the Court, I renew the offer in evidence of the letter of May 6th, together with this letter of May 24th.

Mr. SEABURY.—We will interpose no objection to the second offer, that is to say, of the offer of the letter of May 24th, signed by Mr. Smith, president of the plaintiff company.

Mr. ELLINWOOD.—Our statement is that if there was ever any question about the authority of Mr. Cox in the matter, it is now precluded by the letter of the company which takes up the same subject matter and reviews it and shows under whose authority Mr. Cox was acting and why he was acting.
[117—59]

Mr. SEABURY.—We don't think it shows that, your Honor. We think it shows that where advice is received by Mr. Smith from Mr. Cox that some

conversation had taken place and the letter expressly says, I now desire to take up with you what you are to do.

Mr. ELLINWOOD.—For a minute, I'll withdraw that.

Q. Mr. Cox, subsequently to writing this letter of May 6th, had you any conference with Mr. Smith on the subject?

Mr. SEABURY.—We object to it, if your Honor please, we don't think that would have been permitted for a moment on direct examination. We object to the question as being improper and inadmissible.

The COURT.—I sustain the objection.

The COURT.—Am I correct in my recollection that this witness is the person who sold this plant to the defendant company?

Mr. ELLINWOOD.—Yes, sir, the letters already in evidence show that leading up to the negotiations he was representative of the company that sold the plant.

Mr. SEABURY.—He was representative as far as being a salesman is concerned, but the contract wasn't entered into by this witness, but the negotiations were entered into by Mr. Smith, who was president of the company. He never signed any contract which bound the company in any way.

The COURT.—Well, I can only admit this letter as going to the credibility of the witness as showing at that time, what he admitted to be the condition of the plant and any proposition which it may contain. With reference to the modifications of the written

contract, it will not be received at this time upon the ground that there is no authority shown in this witness as representative of the Smith-Booth-Usher Company to make any such modification in the original contract.

Mr. ELLINWOOD.—May it please the Court, it seems to me [118—60] there is a distinction there between the power of the witness to make a modification of the contract and the power of the witness to make a proposition to modify the contract which was in fact accepted. What he said in connection with this thing seems to me would go to his credibility and what he thought of the situation.

The COURT.—That is the theory upon which I am admitting it.

Mr. ELLINWOOD.—And we will take the other part up later in the examination.

Mr. SEABURY.—We respectfully except to the admission of the letter at this time for any purpose, particularly upon the ground that I don't understand that there has been any offer of it for the purpose of affecting the credibility of the witness, nor do I understand that at this time the evidence of the witness can be subject to being affected by the question of his credibility.

Mr. ELLINWOOD.—Is this witness beyond the rule?

The COURT.—I think the better practice would be to ask such question as to the letter as you desire and that you introduce the letter on your case.

Mr. ELLINWOOD.—This letter of May 26th, May 24th, was admitted without objection.

Q. Mr. Cox, in that letter that you testified you wrote on May 6th, did you state, "in reference to the crude oil gas-producer which we furnished you on our contract, dated December 5th, 1912, I beg to advise that in making this, we adopted a new type of washer which had every promise of cleaning the gas better than any installation we had ever made, without the use of mechanical apparatus. After a series of tests, however, we find this static scrubber does not clean the gas as clean as you desire for your long pipe-lines—"?

Mr. SEABURY.—We object to it, your Honor, as incompetent and [119—61] on the grounds already urged.

The COURT.—Overruled.

Mr. SEABURY.—We except.

A. I did.

Q. Didn't you at that time in that letter also request an extension of time in which to install such mechanical scrubber?

Mr. SEABURY.—We object to that on the ground already urged, and on the further ground that the letter having now been received in evidence is the best evidence of its contents.

Mr. ELLINWOOD.—I haven't read the letter.

Mr. SEABURY.—The letter is in evidence. It has theoretically been before the jury.

Mr. ELLINWOOD.—Do you object to my reading it before the jury?

Mr. SEABURY.—I made my objection and it has been overruled.

The COURT.—No. I haven't admitted it in evi-

dence in the case. I permitted him to read it to frame his question from it and unless he introduces the letter on defendant's behalf, it will not be received in evidence at all.

Mr. SEABURY.—I understood, your Honor, that the record showed that the letter was offered and I objected upon the various grounds stated. The objection was overruled in part and sustained in part. Part of it was admitted. The letter was admitted with the qualification that it would be received only as tending to affect the credibility of the witness.

The COURT.—Is that your understanding?

Mr. ELLINWOOD.—I had supposed that you stated it really ought to go in our case, that is as a whole, but that I could ask him any questions as to what was contained in the letter and what it stated.

The COURT.—Then on your own case in support of your defense, you may, if you so desire, introduce the letter, but I [120—62] don't at this time admit the letter, because I don't think this is the time for introducing it.

Mr. SEABURY.—I don't either, your Honor, and it has been the substance of my objection.

The COURT.—Technically, it might not be improper, but I think the rule is to frame your question, identify your letter and then if you so desire, introduce that letter in support of the defense.

Mr. SEABURY.—Then if my understanding is incorrect about the letter not having been received in evidence, I desire to object to this question upon the ground that it purports to be based upon some-

thing in writing which is not in evidence and purports to call for contents of a letter not in evidence.

The COURT.—I overrule the objection.

Mr. SEABURY.—We except.

Q. I would like to ask you, Mr. Cox, if at this time, in this written communication, you did not state: “We ask that you grant us an extension of time, that we may dispense with the present horizontal static scrubber, go back to our vertical type and in addition thereto install a mechanical scrubber such as we are now using at El Centro, which we are advised by the manufacturers will consume 10 H. P. for the 600 H. P. plant, which is approximately 1.67% of the total power generated. Delivery of this washer can be made F. O. B. Buffalo in six or eight weeks.”

Mr. SEABURY.—We make the same objection to that last question.

The COURT.—In connection with this witness' testimony on direct examination, I will admit that question for the purpose of going to his credibility and not for the purpose of showing any modification of the contract.

Mr. SEABURY.—We respectfully except, your Honor, to the qualified admission of the letter on the ground, particularly, [121—63] that the credibility of this witness is not yet and could not yet be in issue in this case.

The COURT.—Overruled.

Mr. SEABURY.—Exception.

The COURT.—Now, in order that the record may show, it is admitted as tending to affect the credi-

bility of the witness, I mean laying the foundation for the question, which might tend to impeach or go to the witness' credibility.

A. I did make the statement as read. I had a conversation with Le Grand regarding this plant, in the presence of Mr. George Douglas and Mr. Ensign on the evening of May 5th, on the veranda of the Hotel Morenci, at Morenci.

Q. Did you at that time state that you had gone as far as you could with the apparatus as installed?

Mr. SEABURY.—We make the same objection as already urged.

The COURT.—Same ruling.

Mr. SEABURY.—We except.

Q. Or perhaps the exact words, that you had "reached the end of your rope"?

Mr. SEABURY.—Same objection.

The COURT.—Same ruling.

Mr. SEABURY.—Exception.

A. I made that statement regarding the cleaning of the gas. No, I did not ask Mr. Le Grand to allow me to install a rotary or centrifugal washer.

Q. Whom did you ask?

Mr. SEABURY.—We urge the same objection.

The COURT.—Same ruling.

Mr. SEABURY.—Exception.

A. I asked no one at that time. I asked Mr. Thompson later. The question of a rotary or centrifugal washer was discussed at that time,—not by myself, but by Mr. Le Grand and Mr. Ensign.

VIII.

The Court erred in sustaining defendant's objection to and excluding testimony offered by the plaintiff by which plaintiff proposed to show the limits of the authority of Mr. Cox to act on behalf of plaintiff. For the purpose of eliciting this testimony plaintiff propounded the following questions to witness Smith:

Q. In what capacity, if any, did Mr. Cox work for your company in connection with the installation of this plant?

A. There was no special engagement for that work. He had been in our employ and it was agreed when he bought an interest in another business and left our employ that when we were ready to make the tests he would make the test for us and continue his work for us on the same basis as before he severed his connection with us. He severed all connection with our company February 1st, 1913, I think.

Q. Now, what I am trying to get at is, Mr. Smith, what was the character of his employment and work done for the plaintiff company in connection with the installation of this plant as distinguished from its sale or from the making of the contract?

Mr. ELLINWOOD.—May it please the Court, I object to this questioning the transaction of Mr. Cox. I think that they are estopped from questioning the authority of Mr. Cox in this matter.

Mr. SEABURY.—We are not claiming Mr. Cox didn't have authority to do what he did. We are confronted with a mass of correspondence, identified but not offered in evidence, and it seems to me it is

only proper that we should offer evidence at this time, exactly what the limits of authority was.

The COURT.—The exhibits have not yet been introduced. What relevancy could this have at this particular time? [123—65]

Mr. SEABURY.—There has certainly been an examination of Mr. Cox as to what he did. It is part of our case to show what—how he did do what was done.

Mr. ELLINWOOD.—Here's a lot of letters marked for identification which will be later put in evidence and they are by the Smith-Booth-Usher Company. They are written out of Los Angeles, out of the general office, the name of Smith-Booth-Usher is signed to those letters and Cox's signature is appended. Then he goes to Morenci and makes a proposition in his letter of May 6th. Then Mr. Smith, on the same letter-head, same typewriter, writes to the Detroit Copper Company referring to Mr. Cox's proposition. It seems to me he is estopped. They want to say he is a mere workman or laborer around the office.

Mr. SEABURY.—We simply asked this witness what the authority of Mr. Cox was.

Mr. ROSS.—We think the authority is wholly irrelevant and immaterial and we object to it.

The COURT.—I sustain the objection at this time. It is not material.

Mr. SEABURY.—We except.

IX.

The Court erred in sustaining defendant's objection to and excluding testimony offered by the plain-

tiff, by which plaintiff proposed to prove the second cause of action alleged in the complaint for goods, wares and merchandise sold and delivered. For the purpose of eliciting this testimony plaintiff propounded the following questions:

TO J. H. COX:

Q. Will you tell us what in your opinion is the reasonable value of the installation made? [124—66]

Mr. ELLINWOOD.—May it please the Court, we object to that question for the reason that they are suing on a specific contract for a specific amount. It is true they have a second cause of action in the complaint for goods, wares, and merchandise sold, but whenever a written contract is introduced in evidence, then the second count must certainly fail. They are standing on the written contract and showing that there was a written contract between these parties.

Mr. SEABURY.—I don't know whether your Honor cares to hear from us or not on that question.

The COURT.—Yes, if you think you are right.

Mr. SEABURY.—We do think we are right. We think plaintiff may bring an action on the contract on one count and joint with that an action *quantum meruit*, and that he might be entitled to recover on the *quantum meruit* and yet stand on the contract.

Mr. ELLINWOOD.—There is no question of the cause of action on the contract.

Mr. SEABURY.—It is not a question of the cause of action, your Honor. There is and will be much conflicting evidence as to who breached the contract.

Our position is we performed the contract up to the time the defendant notified us they would not permit us to go farther on the contract.

The COURT.—If you show that fact, wouldn't you be entitled to recover on your first cause of action?

Mr. SEABURY.—We think so.

The COURT.—Then in what way, under what circumstances and conditions, would evidence on the second cause of action be admissible?

Mr. SEABURY.—Under the general allegations of the complaint that they did supply machinery of the reasonable value of the certain sum in issue in this case. [125—67]

The COURT.—True, but you are suing upon and have introduced in evidence a written agreement and upon that you are claiming so much money of the defendants. Well, for the present I'll sustain the objection. If you can show me I am wrong I shall be glad to hear from you again.

Mr. SEABURY.—Shall I propound the question or may I show at this time by offer of proof by this witness, the reasonable value of the apparatus supplied by the plaintiff?

The COURT.—I think that is sufficient.

Mr. ELLINWOOD.—Your Honor excludes it.

The COURT.—Under the affirmation of counsel that it is offered in support of the second cause of action.

Mr. SEABURY.—Yes.

The COURT.—Yes.

Mr. SEABURY.—To which we respectfully except.

TO SAMUEL J. SMITH:

Mr. SEABURY.—For the purpose of the record, your Honor, I desire to ask the witness whether, and do ask the witness whether he knows the reasonable value of the plant installed by the plaintiff for defendant at the defendant's place of business and do ask him to state what that value is, if he knows.

Mr. ELLINWOOD.—To which we object on the ground formerly stated.

The COURT.—Objection sustained.

Mr. SEABURY.—Exception. There is no objection to the fact that the question is not in detail.

Mr. ELLINWOOD.—No. Our objection only goes to the admission of any evidence in support of the second count of the complaint.

The COURT.—That was the theory upon which I sustained the objection.

Mr. SEABURY.—To which I respectfully except.
[126—68]

X.

The Court erred in directing a verdict by the jury at the close of the plaintiff's case in said cause in favor of the defendant against the plaintiff.

XI.

The Court erred in deciding for itself and in failing to submit to the jury the issue of fact as to whether plaintiff had performed the terms of the contract on its part to be performed, substantially or otherwise, and whether plaintiff's performance was prevented by the wrongful act or failure on the

defendant's part to perform some duty which under said contract it owed to plaintiff and which it undertook and promised to perform.

XII.

The Court erred in determining all questions of fact presented by the evidence and in not allowing these issues to be passed upon and determined by the jury.

XIII.

The Court erred in deciding that it nowhere appeared in the evidence that defendant prevented plaintiff from continuing the experiments in accordance with the contract.

XIV.

The Court erred in deciding that defendant had a right to decline to proceed under the contract before the expiration of the time provided in the contract for trial tests. [127—69]

XV.

The Court erred in deciding that the plaintiff was required to prove that upon the trial of the machinery it met each and all of the guaranties specified in the agreement, and that plaintiff had fully performed each and all of the terms of said agreement because the undisputed evidence was that before the expiration of the period of ninety days in which plaintiff could have performed, defendant refused to permit it to proceed with, its tests and terminated the contract and because notwithstanding such acts on the defendant's part, there was evidence establishing that plaintiff had, in fact, substantially performed its contract before complete performance

was rendered impossible by defendant.

XVI.

That the Court erred in overruling plaintiff's motion for a new trial for the reasons averred above in the more specific assignment of errors herein contained.

WHEREFORE, the plaintiff prays that for said manifest errors the judgment of the Court should be reversed.

ALFRED WRIGHT.

By W. M. SEABURY,
RICHARD E. SLOAN,
W. M. SEABURY,
JAMES WESTERVELT.

By W. M. SEABURY,
Attorneys for Plaintiff. [128—70]

[Endorsed]: In the United States District Court for the District of Arizona. Smith-Booth-Usher Company, Plaintiff, vs. Detroit Copper Mining Company of Arizona, Defendant. Assignment of Errors. Filed Jun. 24, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [129]

In the United States District Court for the District of Arizona.

SMITH-BOOTH-USHER COMPANY,
Plaintiff,

vs.

DETROIT COPPER MINING COMPANY OF
ARIZONA,

Defendant.

Order Allowing Writ and Fixing Bond.

This matter coming on this day regularly to be heard upon the application of the plaintiff by its attorneys for the allowance of a writ of error upon its petition presented to the Court, praying for the allowance of a writ of error on the assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers from which the judgment was entered, duly authenticated, may be sent to the United States Circuit Court of Appeals of the 9th Judicial Circuit; that such other and further proceedings may be had as may be proper in the premises.

On consideration thereof, the Court does allow writ of error upon plaintiff giving bond according to law in the sum of One Thousand Dollars.

Dated June 24, 1914.

WM. H. SAWTELLE,
Judge. [130]

[Endorsed]: U. S. Dist. Ct., Dist. of Arizona.
Smith-Booth-Usher Co. vs. Detroit Copper Mining
Co. of Arizona. Order. Filed Jun. 24, 1914, at
— M. George W. Lewis, Clerk. By R. E. L. Webb,
Deputy. [131]

*In the District Court of the United States for the
District of Arizona.*

SMITH-BOOTH-USHER COMPANY,

Plaintiff,

vs.

DETROIT COPPER MINING COMPANY OF
ARIZONA,

Defendant.

Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, Smith-Booth-Usher Company, as principal, and National Surety Company, a corporation, organized and existing under and by virtue of the laws of the State of New York and authorized to do business as a surety company in the State of Arizona, surety, are held and firmly bound unto Detroit Copper Mining Company, defendant in error, in the full sum of One Thousand (\$1000.00) Dollars, the same being the amount of the bond fixed by the District Court of the United States for the District of Arizona by order duly entered on the records of said court on June 24, 1914, to be paid to the said Detroit Copper Mining Company, defendant in error, its legal representatives or assigns, to which payment, well and truly to be made, we bind ourselves, and our and each of our successors, heirs, executors, administrators, legal representatives, jointly and severally by these presents.

Sealed with our seals and dated this 27th day of June, in the year of our Lord, one thousand nine

hundred and fourteen. [132]

WHEREAS, on the 28th day of January, 1914, at the District Court of the United States for the District of Arizona in a suit pending in said court between Smith-Booth-Usher Company, plaintiff, and Detroit Copper Mining Company, defendant, a judgment was rendered in favor of defendant and against the said Smith-Booth-Usher Company for the sum of Two Hundred and Forty-six and 30/100 (\$246.30) Dollars, costs of action, and the said Smith-Booth-Usher Company has obtained a writ of error to reverse said judgment in the aforesaid action and filed a copy thereof in the clerk's office of said court, and a citation directed to the said Detroit Copper Mining Company, defendant, citing and admonishing it to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, State of California;

Now, the condition of the above obligation is such that if the said Smith-Booth-Usher Company shall prosecute said writ of error to effect and answer all costs, and if it fail to make said plea good, then the above obligation to be void; else to remain in full force and effect.

And the said bond and obligation is upon the further express condition and agreement by the sureties thereto, that in case of a breach of the condition set forth herein, this Court may upon notice to said sureties of not less than ten days proceed summarily in said action or suit in which this bond is given to ascertain the amount which said sureties are bound

to pay on account of such breach of said bond and undertaking and render judgment against the said sureties and each of them and award execution thereon.

SMITH-BOOTH-USHER COMPANY.

[Seal]

By JOHN DE R. STOREY,
Attorney in Fact.

NATIONAL SURETY COMPANY,

By LYSANDER CASSIDY,
Resident Vice-pres.

E. R. PETTINGALL,
Resident Asst. Secy.

The foregoing bond is approved. July 1, 1914.

WM. H. SAWTELLE,
Judge. [133]

[Endorsed]: U. S. Dist. Ct., Dist. of Arizona.

Smith-Booth-Usher Co. vs. Detroit Copper Mining Co. Bond. Filed Jul. 1, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [134]

[Minutes of Court—July 1, 1914—Order Approving
Bond.]

MINUTE ENTRY APPEARING UNDER DATE
OF JULY 1st, 1914.

No. 97.

SMITH-BOOTH-USHER COMPANY,

Plaintiff,

vs.

DETROIT COPPER MINING COMPANY OF
ARIZONA,

Defendant.

IT IS ORDERED by the Court that the Bond on appeal of the plaintiff filed herein, in the sum of One Thousand (\$1,000.00) Dollars, with the National Surety Company of New York as surety thereon, be and the same is hereby approved. [135]

[Minutes of Court—July 1, 1914—Order Directing Transmission of Plaintiff's Exhibit "B" and Defendant's Exhibit 1 to Appellate Court.]

MINUTE ENTRY APPEARING UNDER DATE
OF JULY 1st, 1914.

No. 97.

SMITH-BOOTH-USHER COMPANY,
Plaintiff,

vs.

DETROIT COPPER MINING COMPANY OF
ARIZONA,

Defendant.

IT IS ORDERED that in making up the transcript of the record to be transmitted to the Circuit Court of Appeals for the Ninth Circuit at San Francisco, the Clerk of this Court attach thereto and transmit therewith the original of Plaintiff's Exhibit "B" and the original of Defendant's Exhibit "1." [136]

**[Order Directing Transmission of Plaintiff's Exhibit
"A" to Appellate Court.]**

*In the United States District Court for the District
of Arizona.*

SMITH-BOOTH-USHER COMPANY,
Plaintiff,

vs.

DETROIT COPPER MINING COMPANY OF
ARIZONA,

Defendant.

It is ordered that in making up the transcript of the record to be transmitted to the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, the clerk of this court attach thereto and transmit therewith the original of Plaintiff's Exhibit "A."

WM. H. SAWTELLE,

Judge of the U. S. District Court of the District of
Arizona.

Dated, July 16, 1914. [137]

[Endorsed]: In the United States District Court for the District of Arizona. Smith-Booth-Usher Company, Plaintiff, vs. Detroit Copper Mining Company of Arizona, Defendant. Order. Filed Jul. 16, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [138]

*In the United States District Court for the District
of Arizona.*

SMITH-BOOTH-USHER COMPANY,

Plaintiff,

vs.

DETROIT COPPER MINING COMPANY OF
ARIZONA,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that on the 23d day of January, A. D. 1914, at a regular and stated term of the United States District Court for the District of Arizona, before the Honorable William H. Sawtelle, Judge of the above-entitled court, the issues joined by the pleadings in said cause came on to be tried by said Judge and a jury impanelled and sworn to try the issues in said cause.

Plaintiff was represented by Messrs. Sloan, Seabury & Westervelt, and Mr. Alfred Wright, its attorneys, and the defendant was represented by Messrs. Ellinwood & Ross, its attorneys.

The amended complaint and amended answer being read to the jury by counsel, thereupon the following further proceedings were had herein, to wit:

Mr. SEABURY.—We offer in evidence, if your Honor please, the contract which is the subject of the cause of action made between the Smith-Booth-Usher Company and the defendant company, dated at Los Angeles, September 2d, 1912.

Mr. ELLINWOOD.—It is admitted in the complaint. No objection.

Mr. SEABURY.—Together with the specifications attached thereto.

The COURT.—It may be admitted.

(Marked Plaintiff's Exhibit "A" in evidence.)

[Testimony of Lawrence Vorhees, for Plaintiff.]

LAWRENCE VORHEES, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows: [139]

Direct Examination.

(By Mr. SEABURY.)

My name is Lawrence Vorhees. I am a salesman for the Smith-Booth-Usher Company, plaintiff in this action. I have acted in that capacity for approximately six months. Prior to that I was an erecting engineer, for the same company. In December, 1912, and for some time thereafter, I was erecting engineer for plaintiff. I took a mechanical engineer degree at Purdue and I have also had five years' experience in actual work. I was with Llewellyn Iron Works of Los Angeles, California; and the Chadwick Automobile Company in Pennsylvania, and the Smith-Booth-Usher Company. The general character of the work which I performed with those companies was the mechanical work of erecting and making machines, of different kinds. After December, 1912, I acted as erecting engineer for plaintiff, up to within about six weeks ago, continuously. I know about the contract which the Smith-Booth-Usher Company had with the defend-

(Testimony of Lawrence Vorhees.)

ant company, dated December 2d, 1912; in connection with the erection of the plant covered by that contract I went out to Morenci, Arizona, and put up the machines. I went there on March 8th, 1913, and had something to do with the shipping of the machinery. It was shipped to Morenci, Arizona, from Smith-Booth-Usher Company at their yards there in Los Angeles. I didn't do the shipping; I did the loading. I saw it loaded. The loading of it began the latter part of February, 1913. It took one day to get it loaded; in getting it out of the yards. We were delayed two or three days on account of heavy rains. We got it loaded on the cars. I did nothing with reference to it until I reached Morenci. I did not go to Morenci immediately. I received word from the defendant to come to Morenci, I think it was a telegram; I didn't see it. I was instructed to go to Morenci about March 9th, I think it was, or the 10th, that I went there. There in Morenci at that time I saw Mr. McDougall. I understood he was Superintendent of Power for the defendant company. I saw Mr. [140*—2†] Thompson there then also. I did most of my reference with Mr. McDougall, conference, I mean, or interviews. Those connected with the defendant company whom I saw with reference to the erection of the plant were Mr. McDougall and Mr. Douglas and Dr. Sanborn, I think, was there at the time. Mr. McDougall was superintendent of power, I believe.

*Page-number appearing at foot of page of original certified Record.

†Original page-number appearing at foot of page of Bill of Exceptions as same appears in Original Certified Transcript of Record.

(Testimony of Lawrence Vorhees.)

Mr. Douglas was assistant consulting engineer. It was Mr. George Douglas, and the other gentlemen I have mentioned was chemist, Dr. Sanborn. I believe he was the regular chemist of the defendant company. When I got to Morenci, the plant, or machinery referred to in this contract had arrived, all of it. I saw it at the place of the defendant company at Morenci. It was unloaded on the grounds, except one carload. I proceeded to have them unpack or unwrap and begin the erection of it. The foundations were already in when I got there. They were built when I got there. As fully as I can describe just what this apparatus or machinery was that was shipped and which I was sent to Morenci to erect, it is what you use for producing oil gas and it was composed of a cast-iron front lined with brick work and cement, and then the gas passed through washers that washed the gas that contained water. It consisted of three units, three main units. Each unit is approximately about 24 inches wide and about 24 feet long. They were erected side by side; had no connection with each other except that all furnished gas into the same main. All of these units were connected with the same main and not otherwise connected with each other. The function which each unit performed was to manufacture gas. Each of them was about nine feet high. I think that is the highest point and then there's stacks above that. These three units constituted the entire plant covered by the contract—or machine that we were to furnish. That was all we were to furnish.

(Testimony of Lawrence Vorhees.)

Besides this there was required [141—3] to make the gas-producing plant completed the holder and the auxiliary machinery. The holder consists of a tank filled with water and then an inverted tank inside of that which rises as the gas goes in between the top of it and the water level. Forms a receptacle to hold the gas. According to the contract there was one holder, there was a small one furnished. The capacity of a gas-holder of that kind is estimated or measured by cubic feet, cubical contents. The capacity of the gas-holder which was supplied was approximately 1500 cubic feet. The terms of the contract required a 15,000 cubic feet holder to be supplied. The method by which that holder is attached to these three units which I have described is this: The gas comes out of each separate unit into a header of a pipe to run horizontally connecting the three units, that is the gas-main, and from that it went into the gas-main and the holder. Between this header and each unit a quick opening gate was projected so as to cut out each unit temporarily, so that the holder of the gas was connected with the main which was connected with each one of these three manufacturing gas units. The holder was approximately 300 feet from the nearest unit and connected with this long main, 300 feet long, that I have spoken of. In the practical operation of a 1500 foot holder and a 15,000 foot holder, the only difference is that it doesn't give the amount of storage. The 1500 foot holder wouldn't hold as much gas as the 15,000 foot holder. The function of the holder, with

(Testimony of Lawrence Vorhees.)

reference to this gas, is that it allows any suspended matter to settle out of the gas. The suspended matter settles to the bottom of the holder. The equipment the holder in this case has for cleaning out the suspended matter which has been thrown out of the gas and settled in the bottom of the holder is [142—4] an arrangement most generally made for flushing out the holder to take care of this. When I got this plant with the holder that I have described in this case, the 1500 foot holder, completely erected, it was the latter part of April. I wouldn't be certain that in the latter part of April the three units I have described were completely erected on their respective foundations connected with the gas-main, which main was connected with the 1500 foot holder complete; I would say it became complete, say in the latter part of April, approximately. Besides the erection of the three units that I have described and the connecting main and the installation of this 1500 holder, there was some changes made in the washers to allow themselves to operate better under the conditions. These washers were tanks of water that had a diaphragm, horizontal plate running the width of them, and nearly the whole length, and the gas was passed through this water under this diaphragm so as to wash the gas. The washer was not any part of the holder. It was entirely separate equipment. The washer and the relation it bore to the units and to the holder were as follows: The washer was a vertical, about 26 inches, I think, in diameter, and about 7 feet high, vertical tank, you might call it, setting on the

(Testimony of Lawrence Vorhees.)

back end of these washers and the gas passed up through them and the water went down and they were filled with wash trays of lattice work. They stood right on top of the washer. They stood on top of the washer and scrubber. The words "washer" and "scrubber" are used in connection with each other a good deal, they meaning the same thing. The washing apparatus of the gas-producer was sometimes termed the scrubber; it is this horizontal receptacle which held the water and had this diaphragm that I speak of, and on top of that sat these vertical tanks known as scrubbers. [143—5] There was required to complete this equipment, besides the three units I have described, the gas-main connecting them with the holder, the holder itself, the scrubbers and the washers, the auxiliary machinery and necessary piping piping them all, that was a blower and an oil pump, a means of getting water to your water pump. It was part of our business to attend to the requisites of the auxiliary machinery only as to the oil pump. That made the gas plant complete.

Completion was reached about the latter part of April. No kind of a gas-holder was then attached to the plant at that time. It was the first part of May when the gas-holder was attached. It was not attachable and detachable at will. It was attached later on; it wasn't attached at that time. The plant is not complete without the attachment of a gas-holder. The part we supplied became complete the latter part of April, 1913, the part I had charge of putting up, the part we supplied. The whole thing

(Testimony of Lawrence Vorhees.)

according to the contract never became complete, because the contract called for a 15,000 cubic foot holder and that was never connected up. I remained there about a month and a half, seven weeks, and during that entire time I never saw the 15,000 foot gas-holder attached to the rest of the plant except in connection with their other gas plant, but not alone. They had another gas plant there besides the one I was erecting. Besides the one required by this contract a 15,000 foot gas-holder was connected with their own gas plant. We connected the other mains that ran to it, that was the nearest approach we ever got to connecting with a 15,000 foot gas-holder. Exactly what I did in the erection of these various machines or whatever you wish to call them was this: Upon reaching there, Mr. McDougall furnished [144—6] me the necessary men to put the machines up and get them ready and I went ahead and installed them and erected them and got them all connected up ready to operate and started to test them out. After we got them all erected, as I have described we started to operate them and there was two or three small things that we changed to make them clear the soot or lamp black out of the washers, that was all. As to the result of our tests, I myself made no chemical analysis of the gas at all and I couldn't answer that question; such tests were made during my stay at Morenci. The tests were made by Dr. Sanborn, I believe, and Mr. George Douglas.

Q. Did Dr. Sanborn ever make any statement in your presence of the result of tests which he made?

(Testimony of Lawrence Vorhees.)

Mr. ELLINWOOD.—We would like to have the place so the doctor can meet it.

Q. Did you ever have any conversation or hear any statement made by Dr. Sanborn with reference to the result of any tests which he had made?

A. Yes, sir.

A. In the testing house right near the plant, during the first part of May, 1913, Mr. Cox and Mr. Douglas were also present. Mr. Cox was working at the time for the Smith-Booth-Usher Company and he was with me there part of the time in connection with the installation of this machine. Mr. Cox and Mr. Douglas were present at the time this statement was made. I don't remember the constituents of the gas that was taken at that time. In making these tests Dr. Sanborn made data of the gas, the constituents of the gas. He made the statement it was a very good power gas that we were making. He made no other statement with reference to it that I particularly recall at this time and think there were no other conversations had between me and any of the other officers of the defendant company with reference to [145—7] the erection of this gas plant or its operation; I don't recall any others. I saw very little of Mr. Thompson, the manager of the defendant company, during the erection. I was in daily communication with Mr. McDougall. Mr. McDougall saw the progress which was being made in the erection of the plant. I very seldom saw Mr. Thompson; I could not say whether he did or not. I was in consultation with Mr. Mc-

(Testimony of Lawrence Vorhees.)

Dougall with reference to the manner of erecting the plant.

Q. What, if anything, did Mr. McDougall say with reference to whether it was being erected satisfactorily or not?

Mr. ELLINWOOD.—I should think the contract would control. I don't think that Mr. McDougall or any other employee could change the terms of this contract. He can testify it was being made in a workmanlike manner, but I don't think any oral conversation with anybody can change the terms of that contract.

Mr. SEABURY.—We don't offer it, if your Honor please, for the purpose of varying the contract. I offer it for the purpose of showing that while this work was going on, the defendant company and its officers knew it was being erected in the manner in which it was being erected and no objection was made to the manner of its erection.

The COURT.—Unless you can show some contract to vary this, it seems to me the presumption is that it was being erected by the engineer in the most suitable and workmanlike manner.

Mr. SEABURY.—I have no desire to show any variance with the contract, but I direct your Honor's attention to the fact that the allegations of the complaint are, among other things, that the contract required shipment within a given period of time; that plaintiff exceeded that period of time and thereafter we allege that that possible objection [146—8] to the performance of the contract was

waived by the defendant, and that the acts of waiver consisted in part in the defendant's officer allowing the plaintiff to go on with the erection of the plant, notwithstanding they were late in the fulfillment of the contract.

The COURT.—It isn't set up here, is it?

Mr. SEABURY.—We are required to set up waiver for failure to perform in that minute particular and having alleged it, it is an essential part of our proof.

Mr. ROSS.—I don't think there is any difference between counsel at all here. They contracted to ship it in 45 days. They put it up in 90 days and we are not objecting to it.

The COURT.—They admit you put it up on their property and it seems to me they are—

Mr. ROSS.—We never objected on the ground that additional time elapsed; we were more anxious to get that plant in working order than they were to sell it.

The COURT.—I hold that that is a burden that you do not have to carry; proof that you do not have to offer. That they have waived any rights they may have had under the contract to require you to deliver it within the 90 days.

Mr. SEABURY.—That being a concession of counsel, I'll gladly accept it.

Mr. ROSS.—We don't claim it.

Mr. SEABURY.—Any breach of contract?

Mr. ROSS.—Any breach of contract for failure to ship. We admit you did ship.

(Testimony of Lawrence Vorhees.)

The COURT.—Within the time mentioned in the contract?

Mr. ELLINWOOD.—Certainly. Within the time mentioned in the contract. We don't claim any forfeiture in consequence of that time. [147—9]

Mr. SEABURY.—I'll be very glad to accept the admission.

A. Each unit had a separate washer. All the washers we installed in each unit were the same. The washer was made of sheet steel and was approximately 22 inches wide and about three feet deep and had a plate that ran the whole width of it and within a little distance of the back end and the water level was carried in this above the diaphragm, above this plate and the gas was forced through this water, between the water and this plate, for the purpose of washing it. On the back end of this washer was a tank which is generally known as a scrubber that the gas went up through and which was filled with lattice work or made out of wood and the water came down as the gas went up. After we put in some baffles so it would clean itself out that type of washer properly performed the functions for which it was designed. At first it did not; thereafter at the time when the water went out, we put in a curved baffle so as to tend to make the water run out with a higher velocity and carry the soot or lamp black out with it. After we made that arrangement it performed the function for which it was intended. We made no change in the scrubbers as they performed the functions for which they were intended.

(Testimony of Lawrence Vorhees.)

We got through with this in May. I left there the latter part of April. Prior to leaving Morenci in April, 1913, I had made tests of these units and this gas plant as we had erected it.

Q. Tell us what tests you subjected it to for operating purposes.

A. We operated the units and made gas.

Q. Tell us what you did, what tests you subjected it to, Mr. Vorhees.

A. Why, in making gas out of the oil, using oil and air, to make gas for gas engines and we operate them and made the gas. I do not know what kind of gas we [148—10] made. I made no test of the gas. It was not part of my business to test the gas. It was someone else's duty. My work was chiefly with reference to the installation and construction—erection. When I left it on April 13th, the plant contained a little suspended matter, so called. It contained some suspended matter—I don't know that I am enough of a chemist to describe what I mean by suspended matter—I had nothing to do with that.

I think the duration of the test of the plant was supposed to be 90 days. I don't remember what it was for a fact. I don't know how long we tested the plant. I didn't remain there 90 days. There was a test of the plant on behalf of the Smith-Booth-Usher Company in which I didn't participate, as far as I know. Mr. Cox, I think, conducted those tests on behalf of the plaintiff company.

I have read over the manufacturer's bulletin at-

(Testimony of Lawrence Vorhees.)

tached to and made part of the contract, Plaintiff's Exhibit "A." I am not acquainted with anything but the mechanical end of it. I am familiar with the mechanical end of it. I am able to say that it was substantially as described in the manufacturer's bulletin attached to the contract. I am able to say that the plant was of the latest improved design. I am able to say whether or not the plant was made of first-class material and workmanship. It was made of the best kind of workmanship and material that could be furnished in Los Angeles by companies in Los Angeles to make it so. That is regarded as first class, I believe. I know that the purposes for which this plant was intended to be used by the parties was power for gas engines, I believe. The plant was for the defendant to make gas to be used in their engines. The plant which the plaintiff was to furnish was to make gas to make power to move machinery for the defendant. [149—11] I don't know whether the machinery which was furnished by the plaintiff to the defendant did properly perform that duty. I know that the plaintiff company furnished plans and specifications for the erection of this plant. I know that the plaintiff furnished the defendant an operating engineer at \$6.00 per day and expenses from the date of leaving Los Angeles until the date of his return. Upon the arrival of the apparatus at Morenci we immediately after unloading commenced to carry on the work of installing apparatus. That was practically immediately. We prosecuted that work continuously until it was built

(Testimony of Lawrence Vorhees.)

and in doing the work we followed the plans and specifications furnished by plaintiff company. The apparatus, plant, was not operated for a period of ninety days.

Mr. SEABURY.—I think that is all.

Cross-examination.

(By Mr. ELLINWOOD.)

I was operating engineer, sent out by the company to erect the plant. I left Los Angeles on the 8th, I believe. I had the plant erected and started it approximately about the 27th of March—I wouldn't be exact—about just the exact date, somewhere around the 27th or 28th. I had the headers or the units connected then with the gas-mains of the company. That gas-main led directly into the 15,000 foot holder if the valves were open.

This picture you show me is a correct representation of the situation as I found it there. This is a picture of the plant unhoused before it was finished.

Mr. SEABURY.—Do we understand you wish to offer it?

Mr. ELLINWOOD.—I will later probably. He has identified it and I want to use it in connection with his testimony.

Mr. SEABURY.—It may be marked as Defendant's Exhibit 1. [150—12]

The COURT.—It may be formally offered when the defendant puts in its case.

This large object in the sky line of the picture is the large 15,000 foot holder of which I speak and the small object by its side is the small holder of which

(Testimony of Lawrence Vorhees.)

I testified. These three objects in front of the picture are the generator-boxes, front of the producers, being the three units of the system. The objects running horizontally here are what I call washers. Then the gas comes up in this standing pipe; then the long pipe cutting the two is what I call the header. The gas from the three units finally assembles, after it has left the machine as a completed article, in this header. In erecting the plant and at its completion, we connected this header with a pipe of about the same size running across to the main, which pipe is not shown in the picture. I believe Mr. Seabury was talking of a pipe of about the same size as the header and which connected that header to this main and the valve of the pipe. This main connects with the large holder. The light-colored pipe coming down the incline, I understood to be the gas-main running over to the mill and also to the power-house, as I understand it. I don't know how far this installation is from the power-house where the gas was to be used with the engines, approximately. It was away over the hill. I don't think I could answer it anywheres near accurate. It is quite a good ways off. I understood that the power-house was over this hill here that you mentioned first, over here is the mill. The power-house is over the hill. I don't know about the smelter.

The question I believe you asked me, was the distance from this header to the small holder and I said approximately 300. It may be less and may be more. In operating. [151—13] the plant, when

(Testimony of Lawrence Vorhees.)

we are not turning it into the mains or the holder, this plate was taken off at the left of the picture from the header and the gas burned there in the atmosphere. Approximately on the 28th, 27th, we started the plant, approximately that day; I couldn't say for certain just the day, making the gas. We burned the gas in the atmosphere. I don't think that on the 28th and 29th we turned it into the mains of the company, into the holder, through the main. I wouldn't be positive about the date; there was a short time, a few hours, it was turned in the mains in conjunction with their gas they were making and from the other gas-producers. It was turned out again because at that time our producers wouldn't clean the soot out of the lampblack. As to what effect it had when turned into the pipes, what effect on the plant, turning the gas in the main and this holder had, I think you misunderstood me. I said that the gas was turned out because of the soot in the washers, wouldn't come out on top of the water. It wasn't the soot in the gas. Turning it into the mains didn't have any effect on the plant, running the plant—none at all. Nothing was done with the mains after it was turned in that I know of. I was there about, if I remember right, about seven weeks. I left there in April some time. We did not turn the gas into the mains and into the holder again in April while I was there. I don't know the exact time I left. It was the latter part—Mr. Cox was there when I left and had charge. I left just at that time Mr. Canning came. I left just

(Testimony of Lawrence Vorhees.)

after he got there. He came there to take my place, I believe. I don't believe I put the plant in operation,—I mean turn it over to the company completed and operating. They withdrew me and sent another man there. The reason of that was, I had sickness in the family [152—14] that called me home. This plant that was erected or the scrubbers or washers of this plant are not the same as described in the bulletin attached to the contract. Those described in the bulletin would be what you call vertical scrubbers and these were horizontal. That change was made on account of the practice; that is used by the gas companies; this horizontal washer had been used by the gas companies in Los Angeles and that is the reason we took it up. We had never used it before, our company. I had not erected it before. This is the first one I ever put in, ever erected, this horizontal scrubber, washer. I have had experience with machines, gas machines, prior to this time, gas plants, gas manufacturing plants. I have put up two different outfits and operated them before this one. I said the function of a gas-holder is a storage tank for gas.

Q. A storage tank,—isn't it a tank which simply takes up the variations and keeps the pressure in the mains? A. Very small.

Q. Quantity of gas in the gas-holder, isn't there—kind of valve or water gauge, isn't it?

A. It might be; yes.

It isn't always the function of a holder to keep the pressure steady in the mains. It has other func-

(Testimony of Lawrence Vorhees.)

tions besides that. A gas-holder has something to do with the cleaning of the gas. In all gas-holders generally used on the line have a storage tank and valve, as you say, and also for settling out any suspended matter that is in the gas. It is not the purpose of this washer and scrubber to so clean the gas that there won't be any suspended matter which would be injurious to the pipes or block up the pipes. You won't find any gas manufactory where the scrubbers and washers entirely do that. I find in this bulletin attached to the contract, the following: [153—15]

“After passing the first water seal, the gas goes through the usual washing or scrubbing process to remove suspended particles; the extent to which this is carried, being dependent on the subsequent use of the gas, effective appliances for the purpose being supplied with the producers which it is unnecessary to describe here as they are of every-day use in all gas works wherever the system of gas making is employed. It should be noted, however, that for engine use, it is unnecessary to clean the gas made by the Amet-Ensign process to a greater extent than to prevent deposits in the pipes as there has never been a case of the slightest injury to engines from the carbon of the Amet-Ensign gas.”

It is my idea that the scrubber doesn't wholly occupy this office. It isn't necessary. I do not wholly transfer that function to a gas-holder. I stated that the small gas-holder was of a capacity of 1500 cubic feet, approximately. That's what I

(Testimony of Lawrence Vorhees.)

was told, that was what the engineers of the Detroit Copper Company told me. I couldn't say that it is a fact that its capacity is 5,000 cubic feet. I didn't personally make tests of the gas; you mean the constituents of the gas. I did not make any kind of test for heat value. I don't know what the heat value was of the gas; only hearsay. I don't know the quality of the gas except what was told me. I don't know the amount of suspended matter in the gas. When this gas was burned at the end of the header, burned in the atmosphere, a small amount of soot was around there. I don't know the quantity. I have no means of determining any of these facts.

Q. As to whether it breached the contract or not: You say that when you left there, the plant was of the latest design as substantially described in the bulletin and was in every [154—16] way satisfactory in your estimation?

A. They were undergoing some changes at the time I left, I believe. I testified generally that the plant was O. K. and put my stamp of approval upon it in the last part of my testimony in answer to Mr. Seabury's statement. The plant was operating perfectly satisfactory in such a way that I couldn't see that any changes were necessary. And as far as I know it met the conditions and was ready to be turned over to the company. There were some changes made and attempted to be made after I left. Before I left there was some changes,—just prior to the time I left there was some changes made. Whether there were any made after I left, I couldn't

(Testimony of Lawrence Vorhees.)

say. It was ready to be turned over in full compliance. Mr. Canning took my place to operate the thing and instruct the Detroit Copper Company engineers; that was my capacity. I was for some time erecting engineer for the plaintiff, Smith-Booth-Usher Company prior to this time. I am now salesman. I have only been a salesman a few months. I have erected several of these engines that have been sold by the company.

Mr. ELLINWOOD.—That will be all.

Redirect Examination.

(By Mr. SEABURY.)

Mr. Ellinwood asked me, I believe, if the bulletin didn't require a vertical scrubber to be installed and I said that I had in part installed a horizontal scrubber instead of a vertical one. The horizontal scrubber which I installed was of the latest improved design. It was copied after the horizontal scrubbers and washers used by all manufacturers of gas. I know that the type of horizontal scrubber which I installed was in common and general use on plants of this kind.

Mr. SEABURY.—I think that's all. [155—17]

Recross-examination.

(By Mr. ELLINWOOD.)

Q. Mr. Voorhees, if this vertical scrubber which is described in the bulletin attached to this contract was satisfactory, why did you change to the horizontal in erecting the Morenci plant?

A. The horizontal scrubber had more pressure on

(Testimony of Lawrence Vorhees.)

the gas and washed the suspended matter, soot, out of the gas better than the vertical scrubber did and that was the reason we used it.

Mr. ELLINWOOD.—That's all, Mr. Voorhees.

January 24th.

[Testimony of J. H. Cox, for Plaintiff.]

J. H. COX, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. SEABURY.)

My name is J. H. Cox. My business is General Manager, Public Utilities, Riverside, Cal. That is my present occupation. Up until the first of February, 1913, I was sales engineer for the Smith-Booth-Usher Company and from February until June I was in business for myself. During the months of April and May I was with the Smith-Booth-Usher Company on the test of a gas plant at Morenci, Arizona. That was the gas plant that was sent to the defendant in this case, the Detroit Copper Company. The qualifications I possess with reference to practical experience and education relating to gas engines are my associations with gas plants and producers of gas and gas engines for approximately sixteen years, the practical end of it. During that time the general nature of my work with reference to gas plants [156—18] has been that a part of the time, for about nine years of that time, I had charge of the electrical end, where all the power was

(Testimony of J. H. Cox.)

generated from producer gas engines and after going to California I was engaged in selling and testing out gas plants, producer gas plants. That work involved the superintendence or supervision over construction and erection of gas plants of this character. It involved knowledge and familiarity with gas plants of this character. To a certain degree my work involved knowledge of the kind of gas that would be produced from a plant of this sort. It is necessary to know the kind of gas, to the degree that from a practical standpoint to know that the gas was the proper kind for the purpose for which it was used. By associating it with tests that I had known to be made, I could estimate very closely the quantity and quality of gas produced by such plant. I should say approximately within ten or twelve per cent.

Q. Now, will you tell us, if you recall, what, if any other plants, similar to the plant in this case, have you erected or superintended the erection of?

A. Two others exactly similar to this.

Q. Two others exactly similar to this? A. Yes.

Q. Whereabouts were those?

A. One was here in Arizona, about 20 miles northwest of here in this state and another one in California about 30 miles from Los Angeles.

Q. Now, do you know what the capacity of those plants were?

A. They were 200 horse-power each.

Q. Is that the capacity of this plant?

A. That is approximately one-third of the capa-

(Testimony of J. H. Cox.)

city of this plant. In other words, this was about 600 horse-power.

Q. And were each of the other two plants 200 horse-power? A. 200 horse-power plants.

Q. In each case is that right?

A. Yes. [157—19]

Q. Would that mean, Mr. Cox, that in the other plants, there was only one, instead of three units, gas-producer? A. Yes.

Q. And the number of units, was that the only difference in the plants?

A. That was practically the only difference, only that the other plants consisted of complete plants, engines, gas plant complete, the engine, all its auxiliaries, together with the pumping equipment that went to make up the complete plant. This plant in question now, was the gas plant only.

Mr. ELLINWOOD.—Let me ask the witness a question. Mr. Cox, this installation that you are speaking of was before or after the installation of the Morenci plant?

A. Before the installation.

Mr. ELLINWOOD.—May it please the Court, to make our position plain in this matter, I didn't object to this question, figuring that probably it went to the qualification of the witness. That is the only purpose I could see for introducing this testimony. We object to any line of testimony showing the character, installation or operation of other similar plants, or dissimilar to prove this case.

(Testimony of J. H. Cox.)

The COURT.—I did not understand it was offered for this purpose.

Mr. SEABURY.—I offer it for two purposes; first, on the question of qualification on which I think it is undoubtedly competent, and second, as laying the foundation for testimony which may relate to other plants. There is no other way in which the foundation for the admission of testimony relating to other plants can be admitted. I concede it would be improper for me to ask this witness questions about other plants unless I had shown the similarity between the other plants and the plant in this case and for [158—20] that purpose I offer the evidence in addition to his qualifications.

The COURT.—I admit it only for the purpose of showing his qualifications.

Mr. SEABURY.—I except to your Honor's exclusion of it for the other purpose.

This blue-print which you show me is a blue-print of one of the units that went to make up the gas plant at Morenci, Arizona. It is an accurate representation of one of those units with the one exception that after going to Morenci I changed the washer in a slight degree. Apart from that it generally describes with accuracy one of the units in question.

Mr. SEABURY.—I offer it in evidence, if your Honor, pleases.

Defendant objected after examining the witness.

The COURT.—I sustain the objection.

Mr. SEABURY.—I except.

(Testimony of J. H. Cox.)

Q. Mr. Cox, is the map which I have shown you, blue-print, I should say, an accurate description of the unit actually erected at the place of the defendant by the plaintiff, with the exceptions just mentioned by you?

A. It is. I am able to indicate on the blue-print which you have just shown me exactly of what those exceptions consist.

Q. So that your designation of it would be perfectly plain to the court and jury?

A. It would be.

Mr. SEABURY.—I now reoffer it.

Mr. ELLINWOOD.—Before he reoffers this exhibit, I would like to have Mr. Cox himself,—he is very competent,—make the changes so that the jury may see clearly.

Mr. SEABURY.—I will be glad to follow Mr. Ellinwood's suggestion. [159—21]

Mr. ELLINWOOD.—If you take that map and redraft it to represent the condition when you left the plant, I think it is competent.

A. I could make the change within five minutes.

The COURT.—You may do so.

(Witness leaves stand to make corrections, after which he returns.) Objection withdrawn. Map received and marked Plaintiff's Exhibit "B."

I will explain as briefly as I can Plaintiff's Exhibit "B" so the jury will understand it. This is the gas-producer here. The oil is fired at this point and the gas, mixing with the air goes through these combining tubes and down in this rear-combining

(Testimony of J. H. Cox.)

tube and then into the washer which is the water seal. Goes along under this diaphragm, you will notice by the dotted lines, mixes with the water and rises at this point. The gas goes out through this vertical washer which has a water spray inside here. The water and lampblack float along the upper part of this diaphragm and discharges at this point on the opposite side here as shown by the dotted lines. A top view looking down on the washer, directly down on it, it is discharged through this neck here into a seal or —— to keep the gas from floating out with the water. This stack, as you will notice here, is what you term the burn-out stack in the generator to prevent clotting of coke or clinkers as in the old types of producers which were run until they were full up and then cleaned out and another one used while they were cleaning. This is to make continuous operation. When coke clogs in to a certain extent, the gas is cut off for a few moments or as long as necessary, a few moments, and the free air allowed to pass through with this stack open, which burns out any accumulation of coke or lamp-black which might be [160—22] formed in these combining tubes.

Q. Mr. Cox, for the purpose of the record, will you mark on the map, please, the Figure 1, to designate what you describe as the unit, the gas-producer proper.

Mr. ELLINWOOD.—The whole thing is a unit, isn't it?

A. This here is No. 1, that is what you consider

(Testimony of J. H. Cox.)

the gas-producer, the generator. This is the horizontal washer.

Mr. ELLINWOOD.—Mark it 2.

A. No. 2, this is the vertical scrubber No. 3. The stack is No. 4. As to the discharge of the water, this neck where water and lampblack leaves the washer, I'll mark No. 5.

This neck here or discharge outlet was increased for the reason that the water in this neck was found too low or too small and the water above the diaphragm was up about the height of the top of this neck, and instead of the lampblack discharging with the water, the water would go out and the lampblack would skim, you could skim lampblack right off the water, and left it on top of this diaphragm in the washer. I marked that neck five up there, which is the same as it is down here, shown in vertical sections. I made another change with reference to the horizontal washer. I found also that to make the lampblack discharge with the water properly, so there would be no accumulation left in the washer, it was necessary to have an easy curve and increased velocity at this point or to increase the curve so there could be no clogging of lampblack in any sharp curves or corners. Therefore, I placed in this corner what is called a baffle made of boiler plate, so water and lampblack would strike this point and turn at an easy curve and discharge in this neck. That baffle is marked with a dotted line. I mark that No. 6. Another [161—23] change that I recall making was at this point, which I mark

(Testimony of J. H. Cox.)

7. At this point here at the end of the diaphragm I found that the gas in coming through here underneath the diaphragm would come up here in a small thin film of gas with the water bubbling up and it would eventually pile up here and this lampblack, in order to get across here or attempting to get across here to be discharged, would go up with the gas in this vertical washer. Consequently I increased this to a point so that it was beyond the point of this vertical washer so the gas would go up here and come over here and take an easy curve like this and the lampblack would drop down and go on with the water. I had no further trouble with clogging of lampblack in the washer after I made these changes as indicated. It worked better after that. There was no clogging. This plant that I installed was a 200 horse-power International Amet Crude Oil Gas-Producer. That is, three 3-200 horse-power units. They were lined with brick or concrete and had piping and valves as shown in the cut in the bulletin attached to the contract. I would say in regard to the scrubbers and oil pumps and plans and specifications for installation, that was furnished also. The units and plants were erected in accordance with the plans and specifications.

Q. Mr. Cox, do you remember when it was you arrived at Morenci?

A. On or about the 2d day of April. The plant that I have described was erected at that time on its foundations. It had been entirely completed in accordance with the plans and specifications. Noth-

(Testimony of J. H. Cox.)

ing else remained to be done to it. It was completely erected when I arrived. It wasn't in operation when I arrived. To put it into operation I went through the regular course of starting the producer up; that is, firing up the generators. [162—24] That is done by, of course, starting up the auxiliary apparatus by starting up the blower to furnish air, starting up the oil pump to pump the fuel and lighting a fire in the generators—is about the operation of the plant, that was all done, and then after that was done the plant began to operate. At the start there was some pulsations in the fire; the fire couldn't be made to burn steady and this unsteady fire caused the gas to be of lean value. By that I mean that it was a lower B. T. U. value than should have been on account of the unsteady fire and an excessive amount of lampblack was made, which prompted the changes that I have just spoken of. It consumed several days time in determining just what the cause of it was. The plant was tried—I think these changes were made about the last week in the month of April. I think the actual work of making the changes was about eight to ten days. After those changes were made with the gasket between the producer and the washer, had blown out in each unit, leaving a hole by which the gas could pass through and go above the diaphragm and not go underneath and mix with the water as intended, it was necessary then to remove all the generators from the washer and replace with gasket. That was done. After that we operated the producers again

(Testimony of J. H. Cox.)

singularly. I don't believe there was all three of them operated at one time after that. This was because the capacity of the pipe-line in running over to the small holder was not sufficiently large to carry all of the gas from the three generators. The temporary pipe-line that was used to the small holder. The capacity of that temporary pipe-line was approximately one-third of the capacity of the plant. It was only one-third as large as necessary to carry the product of these three units.

I made arrangements with the gas engineer of the [163—25] Detroit Copper Company, Mr. McDougall, that after—with him and the consulting engineer at the same time and the arrangements I think were made with Mr. McDougall and as to the installation, that if he would furnish the pipe I would furnish the labor. That is the way in which the temporary pipe-line was installed; that temporary pipe-line was never changed and another large one was never substituted in its place. There was no change made in that temporary pipe-line. As to whether the temporary pipe was in connection with the producers and 1500 foot gas-holder, I am not certain as to the capacity of the cubical contents of that holder, but it was the small holder that was in use by the company. There were two gas-holders there. The large one was 15,000 foot capacity, approximately, as I was told by the company engineers. I don't remember as to the contents of the small one. It was much smaller than the large one, a great deal smaller. This pipe I speak of connected

(Testimony of J. H. Cox.)

the three producers with this holder. It connected the producers with this holder but not from the holder to the gas main supplying the engine. It merely connected on to the holder as a makeshift or a way of measuring the gas. That arrangement was entirely temporary. It had no other purpose there but the purpose of measuring the quantity of gas made. I left Morenci on the 7th of May, approximately the 7th of May. The trial of the apparatus was not complete at that time.

Q. Will you please tell us the circumstances under which you left Morenci at that time?

A. I think it was the night of the 6th I had a conference with the company's engineers and consulting engineer, Mr. Le Grand, and the assistant consulting engineer, Mr. Douglas. There was also present Mr. O. H. Ensign, the inventor of this process. And I had a verbal understanding with the engineers. [164—26]

Q. I suggest you just state what took place; don't state the conclusion; just state what was said. State the conversation as near as you can.

A. I proposed to the engineers—

Mr. ELLINWOOD.—I object to any oral modifications of this contract. If he is going to testify to that. They haven't pleaded anything of that kind and I don't think it is within the issues.

Mr. SEABURY.—I don't understand, your Honor, that the conversation purports to constitute a modification of the contract. A contract of this kind necessarily involves a good deal of leeway in re-

(Testimony of J. H. Cox.)

gard to the manner and nature of its operation.

Mr. ELLINWOOD.—I agree with you.

Mr. SEABURY.—We wish to show not a modification of the contract, but a performance of the contract was discussed at that time which met the approval of those in charge of the defendant's mine there.

The COURT.—In other words, to show that they accepted the plant as completed or as it then stood?

Mr. SEABURY.—No; I wish to show what it was at that time that the defendant desired to have done and what it was that Mr. Cox said on behalf of the plaintiff he would do for the purpose of making the plant perform the terms of the contract. As I say, not at all as to the modification of the contract.

Mr. ELLINWOOD.—In other words, admitting that it would not perform the functions, a proposition to make a different contract with the engineers of the company.

Mr. SEABURY.—That is not the proposition at all.

Mr. ELLINWOOD.—That is just what the proposition is.

Mr. WRIGHT.—The answer alleges that the contract on this [165—27] date was abandoned by plaintiff and the conversation between Mr. Cox and the representatives of the Detroit Copper Company will explain exactly what took place there. In explaining the so-called abandonment of the contract by plaintiff, which is simply a rebuttal of one of the allegations of the answer.

(Testimony of J. H. Cox.)

The COURT.—Yes, but your witness shows that up to the time he testified that there has not been a compliance with the contract. It had not been completed and turned over.

Mr. SEABURY.—I don't understand that the witness has so testified. There has been no proof as to whether it was turned over or not.

The COURT.—He did say, did he not, that the apparatus was not complete when he left?

A. I stated that the test was not complete. There was a 90-day test.

The COURT.—Didn't you use the word "apparatus"?

A. No, the test.

Mr. ELLINWOOD.—I would like to suggest in answer to Mr. Wright's suggestion that he stated that is for the purpose of rebutting what is pleaded in our answer. This should be revelant to some allegation in the complaint.

Mr. SEABURY.—I think it is part of our case, if your Honor please, to show, to negative the possible suggestion that we ever did abandon the work, Mr. Cox's retirement from the place on the 7th of May did not constitute any abandonment of the contract at all. We wish to show that he had made arrangements to return and that that was entirely satisfactory. Now, that isn't a modification of alteration of the contract. The contract was sufficiently broad to permit such a course of conduct on the part of the parties. In other words, as I understand the contract, there was no [166—28] specified time

(Testimony of J. H. Cox.)

within which the work was to be turned over. The work was to be prosecuted diligently and subjected to a 90-day trial by defendant and payment was not to be made until the end of that 90 days' trial, provided it met the guaranty of the plaintiff, unless they wished to make payment voluntarily.

Mr. ELLINWOOD.—In order that the Court may be set right on this and without introducing it at this time, I would like the witness to identify a letter here and show the Court what this is leading up to and what is being attempted to be done.

Mr. SEABURY.—I object to that, if your Honor please; I don't think that is proper.

Mr. ELLINWOOD.—I would just simply like to have the witness identify this letter of his which tells this whole story. I don't wish to put it before the jury, but to hand it to the Court to show the forcefulness of our position.

Mr. SEABURY.—I respectfully object to the method of procedure.

Mr. ELLINWOOD.—We object to any statement of this witness which tends to prove any modification of the contract upon which we are suing.

Mr. SEABURY.—We disavow a purpose to prove by this conversation any modification or alteration of the contract and we offer to prove, as proof of our performance, our terms of the contract as that contract is written.

Jury excused.

The COURT.—I will hear the witness now and pass upon it in the absence of the jury and ascertain

(Testimony of J. H. Cox.)

whether or not it is admissible, in my opinion.

A. My understanding of the questions as asked by Mr. Seabury was relating to why I left Morenci at that date. My [167—29] answer was leading up to the point of giving my reasons why I did leave. Is that what your question intended, Mr. Seabury? That was my understanding of it.

Q. The question really was what conversation was had between you and Mr. Douglas and the other gentleman, Mr. Le Grand that you referred to as the engineers of this company with reference to your departure; that is, as I recall, was the question.

A. Do I understand, then, that you want to hear that?

The COURT.—Yes.

A. The evening of May 6th or thereabout I had a conversation together with Mr. Ensign, with the consulting engineer and assistant consulting engineer regarding the plant, and they made objections that there was too much foreign matter contained in the gas, and I told them that this foreign matter could be entirely eliminated by the introduction of a mechanical washer, mechanical means of separation, and suggested to them that an engineer representative of their company, together with the representative of my company—

The COURT.—Pardon me; was that part of the apparatus which the contract provided for?

A. It isn't provided for in the contract.

The COURT.—Go ahead.

A. That they visit a place where one of these had

(Testimony of J. H. Cox.)

been installed, which was a later and newly tried means of separation, and they agreed to take it up with Mr. Thompson the next day. I had a talk with Mr. Thompson regarding this and made him a proposition that if he would send an engineer, I would send one to El Centro to see this apparatus, and it was agreed at that time that if the apparatus proved successful and was doing the work we contended it would do and thoroughly clean the gas, that I might be granted further time and the [168—30] 90 days might be extended until such time as this apparatus could be installed at Morenci for the further cleaning of the gas, and then I made Mr. Thompson a proposition in writing offer to go to this expense, to do this at my company's expense in addition to what was required by the contract, but it couldn't be done within the time limit of the 90 days. Therefore, I asked for the extension and left Morenci with the full intention of returning, full expectation of having this time extended and the apparatus furnished and expected to return when it was installed to make a further test.

The COURT.—Did you return?

A. The matter took a different phase after I left and Mr. Thompson later on during the month of May notified my company that he would not proceed any further, that meaning that he wouldn't grant the extra time which it would require to install this mechanical scrubber.

Mr. ELLINWOOD.—May it please the Court, all of this is qualified by this written statement of the

(Testimony of J. H. Cox.)

witness. Of course any conversation he had with our mechanical engineers couldn't bind the company. They weren't in a position to speak or act for the company, and of necessity while that could be used as an admission against the plaintiff here, because Mr. Cox, was its representative, it couldn't be used against the company, and recognizing that fact, Mr. Cox wrote a letter to Mr. Thompson at that time setting forth a great deal more, incidentally the very proposition concerning which he had testified in detail and which I wish the Court would see, and offer it so the Court may see it is a complete modification of machinery and time.

Mr. SEABURY.—We object to it as not being the proper time.

Mr. ELLINWOOD.—It isn't in the presence of the jury. [169—31]

Mr. SEABURY.—I understand that. We desire to show, further, the relation existing between the engineers in whose presence this conversation is alleged to have taken place and that is done, if your Honor please, to show that Mr. Le Grand and Mr. Douglas were engineers designated in this case to work with Mr. Cox and Mr. Ensign in the operation and installation of this plant, pursuant to the contract.

Mr. ELLINWOOD.—But not to change the contract.

Mr. SEABURY.—We say there was no change in the contract.

Mr. ELLINWOOD.—But that letter shows—

(Testimony of J. H. Cox.)

Mr. SEABURY.—The letter isn't in evidence.

The COURT.—According to this witness' statement, they made the objection that there was too much lampblack and that he proposed to erect something which I cannot describe in a technical way and then it was agreed that they send some men to Ventura, California, to examine a certain apparatus with a view of determining whether it should be adopted and installed so as to make this plant, these units, do the work for which they were purchased, or rather to remedy the defect which was pointed out by these people.

Mr. SEABURY.—That is the point of variance, if your Honor please. Our position is this: The contract simply provided that the suspended matter in the gas would not be injurious to the engines or gas conducting pipes. The words of the contract were, there will be no suspended matter in the gas which will be injurious to the engines or gas conducting pipes, not that there would be no suspended matter. Our position is this: That the contract was performed even though the suspended matter existed. We will show by proof that the suspended matter which did exist in the gas was not injurious either to the engines or pipes, but the defendant objected to its presence at all, and for the purpose of satisfying [170—32] the defendant as to its objections and entirely without conceding that the presence of the suspended matter constituted a breach of the contract, we wish to show this conversation and what was done pursuant to it. As I say, it wasn't

(Testimony of J. H. Cox.)

enough that mere suspended matter existed, but the breach of the warranty in that respect would have to consist of the injurious effect to the pipes.

The COURT.—You mean to say that this witness' proposition to these people, while maintaining that they had complied with the contract, was simply to remedy an objection which really was not well founded, but simply to satisfy them?

Mr. SEABURY.—That is all, your Honor.

The COURT.—As to this particular objection?

Mr. SEABURY.—And also as explaining the general relations which existed between the parties showing the effort on the part of the plaintiff properly to perform the contract under its terms.

Mr. ELLINWOOD.—In other words, they are going to get something they never contracted for. If that is the case, it is perfectly immaterial what they gave the company outside; if they performed the contract, that is all there is of it.

Mr. SEABURY.—That is what we are endeavoring to show; that we did perform the contract, and as I have said, these conversations were had in the performance of the contract, not changing the contract already made.

Mr. ROSS.—If your Honor please, this contract provided for the installation of certain apparatus described here which included apparatus for cleaning the gas. Now, it has gone, sufficiently far to indicate that certain apparatus was installed pursuant to this contract. The first contract, as will appear from the manufacturer's bulletin attached to

(Testimony of J. H. Cox.)

the contract and made a part of it, required a vertical [171—33] scrubber and to allow the plaintiff to substitute the latest improved design. So the plaintiff picked out the latest improved design which was a horizontal scrubber and installed it. Now, that became the installation under this contract. They had the right to pick out what they would install there as a scrubber and they put it in. Now, counsel suggests that soot and suspended matter could not be material unless it was injurious to the conducting pipes. That is simply explained by the manufacturer's bulletin also referred to. And will the Court also have in mind in connection with this, that the contract specifies as its principal condition on the part of the seller that this apparatus was—shall perform the purpose for which it is known by the parties to be intended. That is part of the language of the contract, under the head of guaranty. It is understood and agreed that any machinery that may be furnished is guaranteed to properly perform the duties it is intended for, etc.

The COURT.—What is the purpose of the evidence, Mr. Seabury?

Mr. SEABURY.—The purpose of the evidence is to show that a tender was made by the plaintiff's authorized representatives to install a similar kind of washer, as I understand it, within the terms of the contract, and that the willingness of the defendant to permit that within the period of 90 days was dependent upon the inspection of the plant at El Centro by their own engineer Mr. Douglas. And the

(Testimony of J. H. Cox.)

only reason why Mr. Cox on behalf of the plaintiff asked for further time in which to complete the plant in that particular was because of the nature of the washer at El Centro and the practical difficulties of securing one similar to [172—34] that, if defendant wishes it to be secured. Now, as I said, without departing from possession of the defendant company, notwithstanding the fact that the defendant failed to turn over to the plaintiff the 15,000 foot gas-holder and was in consequence unable to make changes in accordance with the contract.

The COURT.—I can't see, if it is admissible at all, why it wouldn't show modification of the contract and that has not been pleaded.

Mr. SEABURY.—It is not claimed.

The COURT.—What is not claimed?

Mr. SEABURY.—That there was a modification.

The COURT.—Then I can't—it seems to me that you ought to first show that the plant was installed according to the contract and if there was any reason why it wasn't so installed, then you would be allowed to show the reason it was not completed within the time specified or as provided in the contract. In other words, I can't see that this is admissible for any other purpose than showing a modification of the contract. I sustain the objection.

Mr. SEABURY.—To which we except. Now, if your Honor please, for the purpose of the record, I would like to examine the witness to show the position occupied by Messrs. Douglas and Le Grand

(Testimony of J. H. Cox.)

with reference to the defendant and the performance or acceptance of the work done under this contract, unless it will be conceded by the other side that Mr. Douglas and Mr. Le Grand were each consulting engineers for the defendant, placed in charge of inspecting and supervising and accepting the work of installation of this plant and its erection.

Mr. ELLINWOOD.—Mr. McDougall was superintendent of power, Mr. Douglas was an engineer of the company and *were* in charge of the inspecting of this plant, making tests from [173—35] time to time, both of whom were required to report to the general manager of the company their findings and the general manager alone having the power to accept the plant or change the contract. We admit that much.

Mr. SEABURY.—Is the authority of Mr. McDougall or Mr. Douglas to accept particular portions of the erection of the plant conceded?

Mr. ELLINWOOD.—They have no power to accept anything. They report to the general manager. I have many letters here from them which I will place at the disposal of counsel showing their report to the general manager and the general manager alone speaks for the company.

Mr. SEABURY.—Then I desire to show by the witness what was actually done by these gentlemen that Mr. Ellinwood has referred to in connection with the progress of the plant as it was erected to show that whatever they did was done with the full knowledge of Mr. Thompson, the manager and

(Testimony of J. H. Cox.)

of the defendant company itself.

The COURT.—I think it is admissible for you to prove what they were doing and what authority, if any, they were exercising, and then it would be a question, it seems to me, for the Court to determine whether or not that showed they had any authority to accept the plant or to make any modifications, if it is attempted to show there was a modification.

Mr. SEABURY.—Perhaps I can show by Mr. Cox that Mr. Thompson was familiar with every step of the progress of the erection of this plant and the installation of the machinery and how it operated. If Mr. Cox can give testimony of that kind, I should think it would facilitate the matter.

Mr. ELLINWOOD.—I doubt if he could tell how familiar Mr. Thompson was. Mr. Thompson is here and will testify to whatever he knew. [174—36]

Mr. ROSS.—Any admission that Mr. Thompson made as to the satisfactory erection of this plant would doubtless be admissible. Now, it being determined that they are not going to show modification of the contract, I think the testimony necessarily must be confined to showing such matter as that.

Mr. SEABURY.—Now, what portion of this record, if any, if your Honor please, is to go before the jury.

The COURT.—As I understand it, none at all. When the jury returns you will ask your question and they interpose an objection if they have one and the Court will rule on it. All that has taken place

(Testimony of J. H. Cox.)

during the absence of the jury is inadmissible. If you want it to go in the record, you will have to ask your questions in the presence of the jury and obtain a ruling. But I thought that in the absence of the jury we might determine whether or not it was admissible without prejudicing the right of either party.

Mr. SEABURY.—So long as it is preserved in the record and our exception to your Honor's ruling noted; that is all I am interested in.

The COURT.—It seems to me the proper thing to do, if the question is as you want it framed and the objection is as counsel for defendant want it, when the jury returns, I just simply state that the objection is sustained, without going into all the conversation and discussion that has taken place during their absence.

Mr. SEABURY.—I suppose the stenographer could read what those question were in order that the objection may be made without the discussion and in order that your Honor may rule upon it.

The COURT.—The questions have been propounded and the [175—37] objections have been made and now it is only left to the Court to rule.

Mr. ELLINWOOD.—I understand that the question was asked in the presence of the jury.

The COURT.—And the objection was made?

Mr. ELLINWOOD.—And the jury has no interest in the ruling of the Court.

The COURT.—No.

Mr. ELLINWOOD.—That's all there is of it. If

(Testimony of J. H. Cox.)

they want to examine the witness as to what Mr. McDougall and Douglas did, I can see no objection to that.

The COURT.—I didn't sustain it on the theory that they were not entitled to prove what was done by either of those men as agents, but as to any conversation which they may have had looking to the modification of the contract, this was objected to and I sustained the objection on the ground that the evidence would show a modification of the contract, or was for the purpose of showing such modification.

Mr. SEABURY.—And to that we excepted, as I recall it.

The COURT.—Yes.

Mr. SEABURY.—Then when the jury is recalled, may the questions be re-read and the objection made and the Court rule and the statement made that in the absence of the jury the following discussion takes place, so that this may be preserved in the record?

The COURT.—Yes.

Jury returned into court.

Mr. SEABURY.—May I have the question that was asked at the time the jury went out.

(Question read.) [176—38]

Mr. SEABURY.—It appears of record that counsel have objected and the discussion has taken place in the absence of the jury and that your Honor sustains the objection is that correct?

The COURT.—Yes.

(Testimony of J. H. Cox.)

Mr. SEABURY.—To which ruling, we respectfully except.

Most all of my conferences during my work at Morenci with reference to the installation and erection of this plant were with Mr. McDougall and a part of it with Mr. Douglas. I knew Mr. Thompson and the position he occupied with the company. He occupied the position of General Manager. He was in charge of the business management of the affairs of the company at that place relating to the erection and installation of the plant. I didn't consider Mr. Thompson as being an engineer. I knew Mr. Douglas and Mr. Le Grand before. Mr. Thompson stated to me regarding the trip to El Centro that he would be governed by the advice of the consulting engineers.

Q. And did he name those consulting engineers?

A. It wasn't necessary to name them because I knew just who they were. He referred to Mr. Le Grand and Mr. Douglas. Mr. Le Grand was only there a little of the time. Mr. Douglas and Mr. McDougall were there almost daily. I considered Mr. Douglas as assistant to Mr. Le Grand; that was my information or my understanding of his position. Mr. McDougall was superintendent of power.

Q. Were you in conference frequently during the progress of the work there with these gentlemen and did you confer with them with reference to the manner of the installation of this plant?

A. Mr. McDougall and Mr. Douglas was almost daily on the grounds but the installation at that time

(Testimony of J. H. Cox.)

was made. In fact, [177—39] the installation in accordance with the plans and specifications was made before I reached Morenci.

Q. What conversation took place between you and Mr. McDougall or Mr. Douglas or Mr. Le Grand *make* with reference to the plant?

A. Shortly after I arrived, I asked that we be provided with a holder to enable us to measure the quantity of the gas made, as it was more or less guesswork of making the gas and burning it in the atmosphere. I asked that of Mr. McDougall. He stated that the holder was being used with their gas plant and was the only means of getting the gas from the gas plant to the engines at the mill and that it couldn't be turned into that holder until we could run the mill right along and by blanketing off the connection to their old gas plant to prevent that gas from going into and mixing with the gas from the new plant. I also made that request of Mr. Le Grand when he came and he said that he couldn't provide me with a larger holder but that we could make a connection to the small holder that wasn't in use at that time.

Q. What, if anything, did you say to him with reference to the sufficiency of the small holder?

Mr. ELLINWOOD.—May it please the Court, we certainly object to the question. It is certainly objectionable.

The COURT.—It is very leading.

The COURT.—State what reply, if any, he made?

A. That I made.

(Testimony of J. H. Cox.)

The COURT.—That Mr. Le Grand made?

A. I just stated that Mr. Le Grand said that I might have the small holder connected. In reply I stated that this might be used for measuring the quantity of gas from one unit, but couldn't be used for measuring the quantity at the full capacity of the combined plant. Arrangements were made then for connecting this small gas-holder by a temporary connection. [178—40]

Q. Do you know what the occasion of your departure from Morenci was?

A. The occasion of my departure was to wait the results of the inspection of both company's representatives of the plant at El Centro.

Mr. ELLINWOOD.—That is not the occasion of his departure; that is the very matter we argued all out here. If he would ask him why he left there. What the plaintiff should prove here is that they installed a plant and that this plant was of the type—was what the contract called for. Why he left Morenci—the only reason why he left Morenci, was, I suppose, because the plant was ready to be turned over and was accepted, but to offer proof as to the occasion for his leaving Morenci is a matter which has nothing to do with the contract or any issue in the case; that is the matter we object to.

The COURT.—Now, his answer was that the occasion of his departure was to await the action of the engineer of the company and the plaintiff.

Mr. ELLINWOOD.—We move to strike it out as

(Testimony of J. H. Cox.)

wholly irrelevant and immaterial to any issue in the case.

The COURT.—I think it is immaterial and I grant the motion. Gentlemen of the jury, that remark of the witness is stricken out and will not be considered by you for any purpose whatever.

Mr. SEABURY.—We except.

Q. Mr. Cox, prior to your departure from Morenci on May 7th, 1913, did you have a conversation with reference to that departure with Mr. A. T. Thompson, general manager of the defendant company?

A. I did.

Q. Will you tell us what the conversation was?

Mr. ELLINWOOD.—That is the very conversation that was argued before and I don't know why it becomes relevant just because a different question is asked.

Mr. SEABURY.—Counsel may forget that the condition of this [179—41] record is such that evidence has been taken in the absence of the jury and I find it necessary to make a record that is subject to review and I ask the question for the purpose of the preservation of the record.

The COURT.—It is almost impossible for the Court to tell whether that evidence will show a modification or not. If it was something that was discussed and something had been eliminated at the time they were discussing this apparatus or lamp black or something else, it might be admissible. The question itself is not objectionable.

Mr. ROSS.—That is the very reason that we took

(Testimony of J. H. Cox.)

the witness' answer in the absence of the jury; to see whether the matter sought to be elicited was admissible. Having found it was not admissible, then that point was supposed to be ended. Assuming that the matter now sought to be elicited is objected to and objection sustained as to the form, and which counsel avers to be the case—.

Q. I have made no averment in regard to this.

Mr. ROSS.—But he says it is the same matter and he wants to make the record.

Mr. SEABURY.—I am not familiar with the method of interrogating the witness in the absence of the jury for the purpose of enlightening the Court or counsel as to the substance of his answer. If I propound a question which is not proper or competent, I believe I have the right to have it answered or ruled upon in the presence of the jury.

The COURT.—In view of counsel's statement as to the form of the question, I overrule the objection.

Mr. ELLINWOOD.—Does counsel avow that this is not intended to bring out the conversation that was detailed to the Court in the absence of the jury.

Mr. SEABURY.—I don't care to make any avowal with reference [180—42] to that. I am asking this witness for any conversation he had with Mr. Thompson with reference to the witness' departure from Morenci on or about the 7th of May, 1913.

The COURT.—The objection is overruled.

A. I had a conversation with Mr. Thompson regarding the matter of an extension of the 90-day period of the try-out of the plant.

(Testimony of J. H. Cox.)

Mr. ELLINWOOD.—Now, at this point, if that is the conversation referred to, we object to it as wholly incompetent, irrelevant and immaterial.

The COURT.—The objection is sustained.

Mr. SEABURY.—We except.

The conversation as it related to other matters was in relation to the plant, partially to the plant that was installed. Mr. Thompson made objection to the amount of foreign matter in the gas—contained in the gas. He said that he had been advised by his engineers that there was too much foreign matter in the gas to enable them to run continuously through long pipe lines, or through pipe-lines and the gas must be cleaned better than it was being done at that time.

Q. What, if anything, did you say about that to Mr. Thompson?

A. I told Mr. Thompson that by a system of sprays and sluicing this gas could be run through these pipe-lines and run into the holder and should cause no interruption of the service but if he desired it cleaned better than it was being cleaned, why I knew of an apparatus that had lately been tried or had been tried out since the shipment of this plant from Los Angeles, whereby the gas could be cleaned absolutely. He agreed then to send an engineer to inspect this plant and be governed by the report of the engineer.

Mr. ELLINWOOD.—That is the matter we have already talked about and we ask that that be stricken out. We would not have any objection to going into

(Testimony of J. H. Cox.)

this entire matter, but since it is not [1801½—43] pleaded that we agree that they should have an extension of time for them to go and make a different installation, and since the issues are confined to the installation of the machinery, we object to the proposal of another and different installation being testified to.

The COURT.—Any agreement which the witness stated he had made with the engineer or with Mr. Thompson for a modification of the contract is excluded. Any conversation there with reference to the presence of suspended matter is not excluded.

Mr. SEABURY.—We desire to except to the exclusion of the portion of the evidence offered which has been excluded under this ruling and respectfully direct the Court's attention to the fact that whatever the legal effect of this conversation may be, plaintiff claims that it is not endeavoring to prove any modification of the contract in that respect and it offers the proof which is included in the witness' last answer, not for the purpose of showing any modification of the contract, but to show an effort on the part of plaintiff and this witness to satisfy the defendant, even with reference to matters not included within the contract, and for the further purpose of showing that when Mr. Cox departed for Morenci, he did not depart as an abandonment of the work, nor did he leave it as completed and he was still within the period of 90 days at that time.

The COURT.—Very well, you may take your exception.

(Testimony of J. H. Cox.)

Mr. SEABURY.—Now, what is done with reference to the answer?

The COURT.—Why I have instructed the jury as to what portion of his evidence could be considered and what could not be considered. It seems to me that if you have completed your contract and this evidence is for the purpose merely of showing that you want to do more than you were required to do by the contract, that it is not material to any issue in this case. [181—44]

Mr. SEABURY.—For the purpose of the record, I desire respectfully to except to your Honor's instructions to the jury that there is any part of this evidence thus far admitted temporarily in this case which tends to show any modification of the contract between the parties.

The COURT.—Very well.

The next thing done with reference to this contract after May 7, 1913, was a visit of Mr. Douglas to Los Angeles. I met Mr. Douglas at the office of the Smith-Booth-Usher Company and went with him to the Los Angeles Gas Company's plant to show him the horizontal washers which were in use at that place and of which we copied. And further, Mr. Douglas, Mr. Smith and myself went to the International Amet Company's office to have a talk with Mr. Staunton. Then later I was advised by Mr. Smith that he had received a communication from Mr. Thompson to the effect that the company would go no further with the test under the contract. A short time after that I met Mr. Thompson in Los Angeles

(Testimony of J. H. Cox.)

and went with him to the office of the Smith-Booth-Usher Company and introduced him to Mr. Smith and Mr. Usher, members of the firm. That conference that I have just referred to with Mr. Thompson, myself and Mr. Usher and Mr. Smith took place early in June, I don't remember the exact date. At that time with reference to this matter Mr. Thompson stated as I remember that he did not desire to go any further under the contract and that they did not desire the apparatus or the plant. He said that the amount of soot made would entail too large of an expense to care for it and that the saving in labor over the other plant, the old plant, would not be enough to justify them in using the oil gas-producer.

Q. Was that all the conversation at that time that you recall?

A. I think there was some more conversation between Mr. Thompson [182—45] and Mr. Smith.

Q. In your presence?

A. In my presence regarding the cleaning of the gas.

Q. Tell us what was said with reference to that.

A. Mr. Smith asked Mr. Thompson if his engineer did not report that the gas was being properly cleaned at the El Centro plant—

Mr. ROSS.—We object to any further testimony along the line of what was done at El Centro and why we didn't allow them to make another and different installation and ask that they confine themselves to showing that this installation was all right, this particular one. Not one they wish they had installed,

(Testimony of J. H. Cox.)

but the one they did install.

Mr. SEABURY.—May I have as much of the answer as was made, your Honor, when Mr. Ross began to interrupt? The purpose is not at all what Mr. Ross suggests. It is not our purpose. The purpose of this testimony is not to show modification of this contract. I assume we have the right to show all the surrounding circumstances existing at the time the defendant refused to go on with the contract and that is the purpose of asking the witness this conversation.

The COURT.—As to what was done at the El Centro plant, it seems to me is not material in this case and I sustain the objection.

Mr. SEABURY.—We except.

Noon recess.

I do not remember about when it was that the installation of this plant was completed, as the installation was completed before I reached Morenci. My advices were that it was completed on or about the 26th of March, 1913. The conversation which I say I had with Mr. Thompson in Los Angeles was early in June. At all times up to that conversation we were not engaged in the trial of the apparatus as put up. We were engaged in the trial up to the sixth of May approximately, and it was on or about the [183—46] 7th that I left Morenci to return to Los Angeles. After the 6th of May, as far as I understand, the plaintiff was at all times prepared to go on with the completion of the contract. The apparatus was made of the best material known for the

(Testimony of J. H. Cox.)

purpose. With reference to the workmanship used on the apparatus it was correct as far as I could see. I saw no defect in workmanship. I recall what, by the terms of the contract, was declared to be the purpose for which this apparatus was intended by the parties.

Q. Do you know whether the apparatus installed by your company for the defendant company at Morenci when working within 90 degrees of its normal rated capacity of 600 horse-power and using asphaltum base crude oil, ranging from 14 to 18 degrees Baume, reduced to 60 degrees Fahrenheit, containing not less than 18,500 B. T. U. per pound and weighing approximately 7.8 pounds per gallon delivered at least 415 cubic feet of gas of at least 190 B. T. U. low value for each gallon of said oil.

A. I would say that I don't know, but I would like to qualify that with a statement of why as to what I do know about it. There was provision only made for testing one producer, three units could not be tested to their full capacity. That is the 90% of the 600 horsepower. The only way that I could arrive at that would be of testing one unit and multiplying that by three.

Q. Will you tell us why the full test could not be made?

Mr. ELLINWOOD.—We object to it. It is alleged here that this machine was in all respects in accordance with the contract. They are going to show if it was not in the contract, it is by reason of something not disclosed in the pleadings. The al-

(Testimony of J. H. Cox.)

legation is that it met the guaranty. Let it be proved that they did.

Mr. SEABURY.—The reason is because they failed to supply us with the full 15,000 foot gas-holder. [184—47]

The COURT.—Did you allege in the complaint that they failed to furnish it?

Mr. SEABURY.—We say in paragraph 4 of page 9 of the amended complaint that by the terms of said contract (reads). It seems to me we ought to show what that refusal consisted of.

Mr. ELLINWOOD.—They claim that the machine was perfect and worked.

Mr. SEABURY.—The contract contains the portion of the question which I have read to the witness.

The COURT.—Yes, I followed you in the reading of it.

Mr. SEABURY.—And that apparently is the term of the contract we are required to meet. Now, an essential part of the terms involved the supplying by the defendant of the 15,000 foot holder which we claim it never supplied, and for that reason we are obliged to approximate that result and to show that result was achieved.

The COURT.—It seems to me you should have pleaded it.

Mr. SEABURY.—We did plead, your Honor, that they had failed to supply us with the 15,000 foot gas-holder which, as I recall their pleading, they deny. Is it necessary for us to set out the detail and minute effect of their failure in that respect? We

(Testimony of J. H. Cox.)

do not so understand it. We thought it was sufficient for us to allege as we did. We are now trying to prove their failure and the natural result of that failure.

Mr. ROSS.—In paragraph 6 of the amended complaint, it is alleged that the trial run of the machinery took place on the 27th of March and that the machinery met all the requirements. This is one of the specific guaranties set out in the guarantee. Now, it is claimed maybe it did not meet with the guarantee and they are now trying to show why it didn't. The witness says he [185—48] don't know whether it did or not.

Mr. WRIGHT.—If the Court please, we desire to show that the failure to furnish the holder prevented us from making the tests in exactly the same manner in which they were to be made under the contract, but we will show that the gas was of the same quality required by the contract in every particular. We are prepared to sustain that allegation of the complaint. But we didn't make the tests in the way the contract called for because there was no holder out of which to take the samples to make the test. For that reason we have to show that the test was made in a slightly different way and that is the statement the witness is about to make.

The COURT.—I think you should have pleaded it.

Mr. SEABURY.—It is not a question of fulfillment of the contract.

The COURT.—No, it is an excuse for not fulfilling it.

(Testimony of J. H. Cox.)

Mr. WRIGHT.—No. If I may interrupt the Court to show that there was no provision that we should fulfill the contract in that detail. We have fulfilled the contract in making gas that met every requirement and we are prepared to show that and we are trying to show that now.

The COURT.—If you have done that, why is this evidence material?

Mr. WRIGHT.—If your Honor please, for the purpose of showing how the tests were made and showing how this witness determined that the gas was of the quality required by the contract. I don't believe, your Honor, that we can say the effect of this machine was to produce gas such as required by the contract between plaintiff and defendant. But I do believe that he can say that we produced gas of such and such a quality, and show how he found that out.

Mr. ELLINWOOD.—We are trying to find out if he knows the quality of the gas produced. If this witness made this test that is what we want to know.
[186—49]

The COURT.—I'll sustain the objection to the question as framed.

Mr. SEABURY.—We except.

The WITNESS.—Your Honor, I would like to state that that question embodied—

Mr. ELLINWOOD.—We object to the witness making a statement until he is interrogated. This is an expert witness and will have every opportunity.

The COURT.—You may not discuss the question, but if you have any explanation to make or any ad-

(Testimony of J. H. Cox.)

ditional explanation to make in answer to the question, you may do so.

A. I would state this then; that there was a test of the gas made under more adverse conditions than would have been had it been operating under the 90% of its normal capacity.

Q. Will you tell us when that test was made, by whom and what the result of it was?

A. The test made by myself—

Mr. ELLINWOOD.—We wish to object to this as entirely a matter not pleaded. They state here it met all these guaranties. Let them prove it.

The COURT.—I permitted the witness to explain but I didn't think his answer would go that far.

Mr. SEABURY.—I think we are within your Honor's ruling. We asked him to state what if any test was made, by whom and when.

The COURT.—The objection is that he does not answer the question, but makes statements not responsive to the question.

Mr. SEABURY.—I didn't understand that that was the objection.

The COURT.—And makes a statement which is really not called for by the question at all. He goes further than the question goes in his statement.

Mr. SEABURY.—The last question asked of the witness was, tell us when, in substance, and by whom and where the test was made [187—50] and as to that, the witness began to answer while Mr. Ross was in conference with Mr. Ellinwood.

Mr. ELLINWOOD.—We interrupted because he

(Testimony of J. H. Cox.)

wasn't answering the question.

The COURT.—Instead^{ing} of stating when and where he proceeded to make some other statement. He could have answered when and where it was made.

Mr. SEABURY.—He began by stating what the test was first.

The COURT.—He wasn't asked that.

Mr. SEABURY.—My question embraced all three things, when and where and what the result was, for the purpose of saving time.

The COURT.—I prefer that you take a little more time and ask the question so we won't have so much trouble.

I made a test through the medium of a telltale by burning the gas. I made it several times during the operation.

Q. Now, will you tell us what your test disclosed?

Mr. ELLINWOOD.—What is a telltale?

Mr. ROSS.—You've got me.

Mr. SEABURY.—Is there an objection to this question?

Mr. ELLINWOOD.—Yes, it doesn't mean anything. I would like to know how this test is made.

Mr. SEABURY.—That is what I am asking.

The COURT.—Tell us, when and where it was made. I think the question calls for that.

A. Does that question impute only the times I made the test that was made of the gas.

Mr. ELLINWOOD.—The test that you made.

Q. The question was: what if any test did you make?

(Testimony of J. H. Cox.)

I made a test by observing the gas by the medium of a telltale. A telltale is a burner, of which in the operation of gas is generally burned and observed to regulate the quality of the [188—51] gas and is used almost exclusively in operating results. The telltale is not used for the purpose of making tests for the chemical analysis, but to observe the quality of the gas, which would be considered a test of the gas for operation. By associating it with other gases that you have observed that have been chemically analysed, you can tell within a small percentage of approximately what the value of the gas would be.

Mr. ELLINWOOD.—Is that a calorimeter test?

A. No.

Mr. ELLINWOOD.—Can you ascertain any figures at all from a telltale test?

A. No figures at all.

Mr. SEABURY.—Are you through Mr. Ellinwood?

Mr. ELLINWOOD.—I am through.

Mr. SEABURY.—I may say it is annoying to be interrupted.

Mr. ELLINWOOD.—Then I object to any further testimony about this test. The contract provides for a specific per cent, 190 B. T. U. in figures to 210 and the witness has told us here that the test that he made gave no figures whatever. That test would be absolutely useless as far as meeting this contract.

The COURT.—Is that your statement, Mr. Witness?

A. Well, I don't think, according to the contract

(Testimony of J. H. Cox.)

it was an obligation.

The COURT.—I didn't ask you that. Can't you answer a question?

A. I beg your pardon.

The COURT.—Proceed with the witness. I will not say anything further to him. Read that last question.

(Question read.)

The COURT.—I overrule that objection.

The valve of the gas can be ascertained by tests such as I have described, approximately within 10%. This telltale light that I have described is the only test that I have ever made in the course of my many years' experience in connection [189—52] with gas apparatus of this sort. I have made that test frequently in the course of my experience. In my opinion the result of that test as made by me is a sufficiently accurate estimate of the value of the gas for all operating purposes.

Q. Now, will you tell us what your test showed?

Mr. ELLINWOOD.—May we ask a question or two on the test?

Mr. SEABURY.—The question relates to the qualification of the witness.

Mr. ELLINWOOD.—As to the test; as to the nature of it; whether or not this is such a test as is designed to determine whether the gas is in accordance with the guaranty of the contract.

Mr. SEABURY.—We think, if your Honor please; that is a proper subject for cross-examination. If counsel have an objection they should make it.

(Testimony of J. H. Cox.)

Mr. ROSS.—It is immaterial to us, except I thought it was a proper matter for *voir dire* examination, as the witness has stated he made a certain test.

The COURT.—I think it is proper. I will permit you to ask the question.

Mr. SEABURY.—I except.

Cross-examination (*Voir Dire*).

(By Mr. ELLINWOOD.)

This telltale test is such a test as you could only approximately determine whether the gas was ranging in heat value from 190 to 210 British Thermal Units, low figure, the gas uniform in quality, within 5 British thermal units. I know there's a method absolutely of making this test in figures, but that was uncommon. It was these chemists' business to get absolutely the figures, the analysis of the gas.

Redirect Examination.

(By Mr. SEABURY.)

I had a talk with the chemist of the defendant, Dr. Sanborn, [190—53] with reference to the result of any test which he had made. The talk was in the test-room adjoining the plant and on several different occasions during this time between my arrival and departure from Morenci. The chemist's name I refer to is Dr. Sanberg. I understand he was the chief chemist of the defendant company at that time.

Q. Now, will you please tell us what the conversation was?

(Testimony of J. H. Cox.)

Mr. ELLINWOOD.—Now, we object, may it please the Court, as hearsay testimony. Any statement Mr. Sanberg might have made would not bind the defendant.

The COURT.—The objection is sustained.

Mr. SEABURY.—We except.

Mr. Thompson advised me that Dr. Sanberg was there for the purpose of making the tests. Mr. Thompson so advised me, very soon after my arrival at Morenci.

Q. Now, we ask you again to state the conversation you had with Dr. Sanberg on that subject.

A. May I answer that question?

Mr. ELLINWOOD.—Same objection to the question.

The COURT.—I haven't heard any objection.

Mr. ELLINWOOD.—We object on the same ground.

The COURT.—The objection is sustained.

Mr. SEABURY.—We except.

Q. Mr. Cox, as I understand it, you are not a chemist, are you?

A. I am not. However, I have seen chemical analysis made. I have a general understanding of the process by which they are made. I wouldn't know whether it was correct or incorrect. I believe I saw every test Dr. Sanberg made; every analysis he made.

Q. Does the analysis disclose anything by way of appearance from which you are able to say what the value of the gas is?

(Testimony of J. H. Cox.)

Mr. ELLINWOOD.—We object for the reason that the witness has utterly disqualified himself to testify.

The COURT.—The objection is sustained. [191—54]

Mr. SEABURY.—We except.

There was a small amount of carbon, generally termed lampblack, discernible suspended in the gas produced by this machine prior to May 7, 1913. Upon my first arrival at Morenci there was considerable suspended matter in the gas, but after changing the washers as I explained to the Court this morning, the amount was greatly reduced. At the time of my departure there was suspended matter in the gas manufactured by this apparatus, but I wouldn't consider it too much for the purpose for which the gas was to be used.

Q. Now, do you know from your practical experience, what, if any, effect the existence of suspended matter in such quantities as you found in this particular gas would have, either upon the engines or the pipes conducting the gas?

A. It would have no ill effects upon the engines. It would have no injurious effects upon the pipe, but without a system of sluicing or cleaning the pipes, it might, after a period, cause the pipes to become clogged.

Q. Would the removal of the suspended matter to which you have referred consist of anything except the ordinary cleansing of the pipes or place where the suspended matter deposited itself?

Mr. ELLINWOOD.—We object to that. The

(Testimony of J. H. Cox.)

contract and exhibit attached to it point out that this process which they are going to install should be sufficient to clean the gas so there would be no deposit in the pipes. It does not provide there should be any sluicing of the pipes after they were put in there.

The COURT.—The objection is sustained.

Mr. SEABURY.—We except.

The difference in its effect upon the quantity of suspended matter found in the gas between supplying the holder of only 1500 feet capacity and a holder of 15,000 feet capacity is that the [192—55] larger the holder the more chance the gas has to come to a rest or reduce the velocity in other words, and by so doing, the larger the holder the more suspended matter, if any in the gas, would be dropped at that point. During my stay at Morenci, I do not know of any test of this gas made with the exclusive use of the 15,000 feet gas-holder. I do not know of any test having been made from my stay at Morenci in conjunction with the large 15,000 foot holder. There was one time in which the gas from one or more of these units which we installed was turned into the 15,000 foot holder; it was during my stay; there was one time when it was turned into the mains, but it could go to any other point in the system as well as going into the holder. It is a fact that at that time their gas, made by the defendant's other plant, with which we had nothing to do was also turned into the 15,000 foot holder. I saw the two holders that have been described here.

(Testimony of J. H. Cox.)

The difference in the quality of suspended matter contained in the gas, in drawing out the gas after it passed through the larger or smaller of those holders, which I say I saw at that place, is that there would be less in the larger holder. There should be less suspended matter, I couldn't say just what the difference would be. The difference wouldn't be very great; yet there would be a difference.

Q. Would there be any difference in the consistency of the quality of gas if any?

Mr. ELLINWOOD.—We object to that; there has been nothing shown yet about what qualities this gas had, whether it was consistent or inconsistent. I don't understand why it should be part of the plaintiff's trouble here to explain away any inconsistency which has not yet been shown. I believe this witness testified there was exact and definite methods of getting at these things. [193—56] Now he asked him if there would be a less or greater consistency or flow from one holder as against another one. I don't know that would be revelant to the gas and we object to it.

The COURT.—The objection is sustained.

Mr. SEABURY.—We except.

Q. Now, Mr. Cox, you have testified, as I recall it, that you have made examinations of many similar plants as that erected in this case; is that correct?

Mr. ELLINWOOD.—That went to his qualification only and we have freely admitted the qualification of the witness.

(Testimony of J. H. Cox.)

Q. I'll ask you whether in the course of your experience that you have detailed here *you have detailed here* to us, you have had occasion to examine other similar plants to this?

Mr. ELLINWOOD.—Now, we object to the question as incompetent, irrelevant and immaterial to any issues in this case.

The COURT.—I can't see the relevancy of it.

Mr. WRIGHT.—I believe, if the Court please, that if it can be shown, as we offer to show, that plants of exactly similar type operated under similar conditions, the same type, the same conditions, and producing the same results, act upon the pipes and upon engines in a manner which is not injurious either to the gas-carrying pipes or to the engines, then that will be competent evidence to show that this plant, which is the same as the other plants which have been observed by the witness will not act in an injurious manner in the gas-carrying pipes or the engines. I have authorities here to support the proposition.

The COURT.—As part of your case?

Mr. WRIGHT.—Yes, your Honor.

The COURT.—I would like to see the authorities on that proposition. How do you think that is relevant in your main case?

Mr. WRIGHT.—If the Court please, there is a clause in the contract which provides that the gas produced shall not be injurious [194—57] to either the gas-carrying pipes or to the engine.

Q. Now, we desire to show that this witness and

(Testimony of J. H. Cox.)

other witnesses have in the course of their experience examined other engines of the same type, under the same conditions, and that effect was not injurious under those conditions, and the inference will be that the result is not injurious in this case.

The COURT.—The qualifications of the witness have been admitted. Now, you propose to show by comparison—

Mr. WRIGHT.—Yes; I am not asking for his opinion as an expert witness but rather from the facts which have been based on his observation in other plants.

The COURT.—I don't care to hear further on the objection. The objection is sustained.

Mr. SEABURY.—We except.

I never saw inside of the gas-conducting pipes of the defendant attached to our apparatus during my stay at Morenci. I never made an examination inside. There is no injurious effect upon those pipes discernible from the outside. I did not have occasion at any time to examine the inside of the engines used in connection with this apparatus.

Q. Did you observe any injurious effect upon the engines outside of the engines?

Mr. ELLINWOOD.—We object to that question. It makes no difference whether it affects the outside of the engine or not. I suppose it was bound to get into the engine some way or other.

The COURT.—I overrule the objection.

A. I didn't observe any.

Q. Now, after this apparatus of yours was in-

(Testimony of J. H. Cox.)

stalled, are you able to say whether or not it properly performed the function of a three 200 horsepower Amet crude oil gas producer?

Mr. ELLINWOOD.—We object to that as just the very question [195—58] to be submitted to the jury. The jury is entitled to draw the conclusion that the machine did or not properly perform the function for which it was intended. This objection is supported by many cases. I have seen them particularly where in putting the hypothetical question to an expert medical witness, it is sought to put to him practically the question which is the issue in the case, and as I understand, the authorities are against such practice and require that an expert shall give his answers to hypothetical questions in his opinion, but shall not be permitted to answer upon the general issue itself.

The COURT.—I have some doubts upon that question and prefer to have you cite me authorities on it.

Mr. ELLINWOOD.—I haven't authorities available. I just submit this objection.

The COURT.—How else could they determine whether an engine was working well or not?

Mr. ELLINWOOD.—There are specific guaranties which this engine is supposed to meet. They say it met all of them. Now, they have attempted to prove it. They couldn't prove performance by merely asking, "Did you perform the contract? Yes, sir." Does that prove performance of the contract containing a number of specific guaranties?

(Testimony of J. H. Cox.)

The COURT.—The question is whether or not it was suitable and worked—whether it did good work and performed the duty of that type of an engine.

Mr. ELLINWOOD.—Without going into this question, let me suggest the further objection that this particular installation should be confined to the particular purposes specified in the contract. Now, it may be that this Amet gas-producing plant, as you know, has varied uses, and to ask him whether it properly performed the function of a gas-producing plant is very far [196—59] from asking him whether or not it had anything to prevent its fulfilling this contract. In this particular case, the gas was intended to be used for power purposes and under certain circumstances.

The COURT.—I believe that objection is good. I have just glanced at this guaranty here. I think you should confine that question to whether or not it performed the function herein mentioned.

Mr. SEABURY.—I direct your Honor's attention to the fact that my question included in the first paragraph of the contract itself, which says: "The Smith-Booth-Usher Company will furnish the undersigned three 200 horse-power Amet Crude Oil Gas Producers," and my question was whether or not the apparatus he installed performed the functions of three Amet Crude Oil Gas Producers.

The COURT.—That would not be such proof as would be admissible if it did not come up to the guaranty. That wouldn't be such proof as would be admissible—or rather that wouldn't be sufficient if it

(Testimony of J. H. Cox.)

didn't come up to the guaranty of this contract.

Mr. SEABURY.—May I invite your Honor's attention to another part of the contract in question? "It is understood and agreed that any machine the company may furnish is properly to perform the duty for which it is known to be intended by the parties."

The COURT.—Whether or not it did properly perform the duty for which it was intended should be the form of the inquiry.

Mr. SEABURY.—But I am basing this question upon the theory that the purpose for which this machine was intended must be ascertained, if at all, from the contract itself. Now, if the contract itself describes this as a three 200 horse-power Amet crude oil gas-producer, we assume that the defendant knew perfectly well from that just what that was.

The COURT.—If that were true, all a man would have to do when he makes guaranties, regardless of how many there are in the contract, would be simply to put the witness on the stand and ask [197—60] whether or not the machinery furnished, if it be machinery, properly performed the duty for which it was sold or intended. That is all the plaintiff would have to do.

Mr. SEABURY.—Assuming, of course, that the witness was qualified and knew 200 horse-power gas producers of the same type and knew what functions those other gas-producers performed.

The COURT.—I sustain the objection.

Mr. SEABURY.—We except.

(Testimony of J. H. Cox.)

Q. Now, Mr. Cox, do you know the function to which 200 horse-power International Amet crude oil gas-producers, such as was installed in this case, are usually and customarily put?

Mr. ELLINGTON.—That isn't the question at all.

Mr. SEABURY.—That's the question here.

Mr. ELLINWOOD.—It is what was this engine for? What was the intention of the parties—

The COURT.—Do you object to it?

Mr. ELLINWOOD.—I do.

The COURT.—State the ground of the objection.

Mr. ELLINWOOD.—We object on the ground that it is incompetent, irrelevant and immaterial to show what is customary in an Amet-Ensign engine. It should be confined to the particular case under the contract.

The COURT.—The objection is sustained.

Mr. SEABURY.—We except.

I participated in the negotiations which led up to the making of this contract, Plaintiff's Exhibit "A." I know the function which the parties to that contract intended this gas apparatus to perform. The functions were to manufacture from California crude oil, a power gas to operate a certain number of engines and a concentrator near the gas plant. It was contemplated the gas plant should generate approximately 600 power. It was not to my knowledge intended that it should exceed 600. I did [198—61] not make a test of the horse-power of one unit of the apparatus that I installed. The test was made by the chemist.

(Testimony of J. H. Cox.)

Mr. SEABURY.—I think that's all.

Recross-examination.

(By Mr. ELLINWOOD.)

Q. Mr. Cox, what is the physical condition there at Morenci in the immediate vicinity of where this gas plant was installed?

A. The physical condition? As to just what do you allude?

Q. The topography of the country and the objects which you see there.

Mr. SEABURY.—We object to that as being improper cross-examination.

Mr. ELLINWOOD.—I don't think it is. He has stated it ran over to the concentrator; it was to operate engines in connection with the concentrator. I want to show the general condition there.

The COURT.—I think it is proper cross-examination. The objection is overruled.

Mr. SEABURY.—We except.

A. The plant was installed on a level piece of made land, below the old gas plant and the mill, as I remember was slightly—is slightly higher than the level of the gas plant as installed. Just how many feet I couldn't say. I couldn't be positive that it is higher. I had no way of judging only just from my observations.

Q. Is it not across a small canyon or arroya from the gas plant?

Mr. SEABURY.—We urge the same objection, your Honor.

The COURT.—Same ruling.

(Testimony of J. H. Cox.)

Mr. SEABURY.—We except.

A. I don't recall any arroya between the gas plant and the mill, except there's one low place that is bridged over on the [199—62] railroad track, if it might be called an arroya. There is a slight depression in the earth's surface there.

Q. And approximately what distance was the installation of this gas plant from the engines of the concentrator?

Mr. SEABURY.—We make the objection same as before, your Honor.

The COURT.—Objection overruled.

Mr. SEABURY.—We except.

A. I don't see how I could even approximate that, as that question didn't arise and I had no reason to even take it into consideration. I should say then approximately a thousand feet. The gas plant that the company was using at the time we took these negotiations up with the mining company in reference to the installation that we made was on the sidehill just above the installation that I did make.

Q. And from what is the gas made there or was it at that time?

Mr. SEABURY.—We object to it as wholly immaterial and incompetent.

Mr. ELLINWOOD.—It is material for this reason. The witness was asked if he participated in the negotiations leading up to this purchase and installation of this plant and then was asked what it was for, the purpose of operating the engines at the concentrator, and explaining the plant then in opera-

(Testimony of J. H. Cox.)

tion so that if there was any objection in the first place to this, does it matter? Certainly the door is open by which we can show these negotiations and what was the intention of the parties.

The COURT.—The objection is overruled.

Mr. SEABURY.—We except.

Mr. SEABURY.—I desire to add to my objection, if your Honor please, that the question is entirely beyond the scope of the direct examination and on an issue which is apparently collateral to the real issues in this case and as such is not proper cross-examination. [200—63]

Mr. ELLINWOOD.—He asked if he knew the purpose for which this was intended.

The COURT.—I overrule the objection.

Mr. SEABURY.—We except.

A. I understand it was made from anthracite coal.

Q. Mr. Cox, do you *know*? The evidence is worth more if you know, rather than understand.

Mr. SEABURY.—I submit, if your Honor please, that there is nothing here to indicate that the witness should know.

Mr. ELLINWOOD.—I asked him if he knew?

The COURT.—He asked him if he knew.

Mr. ELLINWOOD.—If he don't know, I have got to abandon my cross-examination.

A. I could state that I do know it was made from coal, but I wouldn't be positive as to just what coal.

Q. Do you know the capacity of that plant?

A. I do not.

Q. You don't know the quantity of gas that is

(Testimony of J. H. Cox.)

being produced? A. I do not.

Mr. SEABURY.—Same objection.

The COURT.—Same ruling.

Mr. SEABURY.—Exception.

Q. Do you know the quality of gas that is being produced? A. Only from hearsay.

Q. And did you know as to what suspended matter it contained if any?

Mr. SEABURY.—Same objection.

The COURT.—Same ruling.

Mr. SEABURY.—Exception.

A. Only from hearsay. I first went to Morenci to take this matter up with the company in the early part of November, 1912. And I was there after that in consultation with Mr. Thompson once [201—64] before I went to the installation.

Q. And you sought to install a plant producing gas from crude oil to supplant the process that they were then using with the hope on your part and their part that it would be more economical for them to make gas from your machine, from crude oil, than from coal; is that not the fact?

Mr. SEABURY.—We object to that as not proper cross-examination.

The COURT.—The objection is overruled.

Mr. SEABURY.—We except.

A. I didn't understand that it was to supplant their present plant, as I understood their present plant was much larger in capacity than the one I was attempting to install. I did hope for the result—that if our plant was a success in the course of

(Testimony of J. H. Cox.)

time it would be enlarged and supplant the entire plant.

Q. So that you were going to sell them a plant to take the place of the plant then in existence, if it proved satisfactory?

Mr. SEABURY.—Same objection.

The COURT.—Same ruling.

Mr. SEABURY.—Exception.

A. I was going to make an effort to do so.

Q. That was what you did make an effort to do, wasn't it? That was the aim and object of your efforts in Morenci?

Mr. SEABURY.—We object further, if your Honor please, upon the ground that this type of evidence tends to vary the terms of a written contract which is in evidence in this case.

Mr. ELLINWOOD.—May it please the Court, I think it sustains the contract and shows the intent of the parties.

The COURT.—Overruled.

Mr. SEABURY.—We except. May it please the Court, may we remind your Honor of one feature?
[202—65]

The COURT.—Yes.

Mr. SEABURY.—Your Honor will recall my first question related to the contents of the contract and when I was unable to prove by the witness what the function of this machine was as stated in the contract, then and not until then—when that effort had failed on my part, did I seek to prove by this witness what he was supposed to know about the purpose for

(Testimony of J. H. Cox.)

which the contract was entered into, judging from negotiations which were made prior to the contract itself.

The COURT.—I understand this is right along that same line.

Mr. SEABURY.—All I asked for, your Honor, and all, I believe he had testified to, were the negotiations immediately prior to the making of this contract. The contract is dated December 2d, 1912, and these other alleged interviews took place at an early date; how much earlier I don't know, but I think it is too remote.

Mr. ELLINWOOD.—The witness testified he knew what the purpose of the erection was; what it was intended to do; the function of this machinery; he participated in the negotiations.

The COURT.—I overrule the objection.

Mr. SEABURY.—Exception.

Mr. ELLINWOOD.—Will you gentlemen please give me the letter of Mr. Thompson to you of November 25th, 1912, reply of Mr. Thompson to the Smith-Booth-Usher Company?

Mr. WRIGHT.—The correspondence I have here in regard to this matter doesn't date back any further than January, 1913.

Mr. ELLINWOOD.—Then you aver it is without the jurisdiction of the Court?

Mr. WRIGHT.—It isn't here.

Mr. ELLINWOOD.—It is without the jurisdiction of the Court.

This letter was called to my attention during these

(Testimony of J. H. Cox.)

negotiations. [203—66]

Q. And that is November 25th, 1912; then you understood at that time from this letter of Mr. Thompson as follows:

Mr. SEABURY.—We object, if your Honor please, to any statement incorporated in this question being read from the letter itself upon the ground that the letter is not in evidence and has not been identified by any proper reference to it and is otherwise improper for the purposes of cross-examination.

Mr. ELLINWOOD.—He says this letter was called to his attention, this letter from Mr. Thompson, and I want to ask him if he then understood this was the object of the installation.

Mr. SEABURY.—In other words, counsel concedes he is about to read from a portion of a letter he has in his hand. We object to it as not proper cross-examination. I call your Honor's attention to the fact that we had a similar letter in a case previous to this and after the damage was done, it was finally excluded.

Mr. ELLINWOOD.—He asked him about the negotiations leading up to the matter. Here's a letter during this period of negotiations which is written by the general manager of the Detroit Copper Company to the Smith-Booth-Usher Company telling them what they wanted it for; what the intentions of the parties were and called to the attention of this man on the ground; the witness on the stand.

(Testimony of J. H. Cox.)

The COURT.—I sustain the objection to it for the present. Counsel for plaintiff went into the question of intention and there was no ambiguity in the contract, apparent at this time, and it was offered without objection. I sustain the objection to it for the present.

Mr. ROSS.—Note our exception.

Mr. ELLINWOOD.—We will offer it later.

Q. I would like to ask you as a matter of fact, Mr. Cox, if it was not a fact that the company was there operating a [204—67] gas-producing plant and that your proposition to them was to make gas from crude fuel oil and to have the plant tested out by a 90-day run, and if the same proved satisfactory, that is, in giving more satisfactory results than the plant that they were working, they should buy your plant after 90-days' trial?

Mr. SEABURY.—I desire to interpose an objection to the question, but before I do so I would like to ask counsel if it is not a fact that he read a portion of the letter into the question?

Mr. ELLINWOOD.—I have framed my question from some of the things in the letter, but I am asking it as a matter of fact.

Mr. SEABURY.—I object to it on that ground and upon the ground that that is only an indirect method of accomplishing what your Honor has just ruled against and also upon the ground that such, if any negotiations as were had between these parties at this time were merged in the contract, which is Plaintiff's Exhibit 1.

(Testimony of J. H. Cox.)

The COURT.—It seems to me that the latter part of the objection is a good one.

Mr. ELLINWOOD.—We are trying to arrive at what the intentions of the parties were. It is proposed to prove the service intended by the parties. To show what the intention of the parties were by collateral evidence is not in derogation of the contract, it is in aid of the contract. We are not trying to contradict the contract, we are trying to explain it.

The COURT.—Does the contract show the purpose?

Mr. ELLINWOOD.—Yes, to perform the functions within the intention of the parties under the guaranty. (Reads:) “Is guaranteed to properly perform the duties which it is known to be intended by the parties hereto.” And this absolutely shows what the Detroit Copper Company had in mind.

The COURT.—I will permit the question in view of that provision [205—68] of the contract.

Mr. SEABURY.—May I say, your Honor, that our contention with reference to that is that the purpose of this contract and the function to be performed by this apparatus is clearly stated in this contract—3 200 horse-power International Amet Crude Oil Gas Producers. That apparatus is described in the complaint.

Mr. ELLINWOOD.—When the intention of the parties is disclosed by correspondence between the parties and brought home to the sales agent and representative there can be no question of what the

(Testimony of J. H. Cox.)

intentions of the parties were as to the duties it was to perform.

The COURT.—I overlooked such provision of the contract. I overrule the objection.

Mr. SEABURY.—We except. May it be understood that this same objection will extend to this type of examination?

The COURT.—Yes.

Mr. SEABURY.—And our exception.

A. It was understood. Or rather I understood that they were operating a plant, a gas-producer plant.

Q. Repeat the question to the witness.

A. That was such a long question and it has several meanings and several answers.

The COURT.—Read the question to the witness.

A. Yes, it was understood.

Mr. SEABURY.—We move to strike that out, if your Honor please, upon the ground that the answer does absolutely tend to vary and contradict the terms of the contract in this suit. In other words, the answer would tend to indicate this was not a contract at all, but a mere option.

Mr. ROSS.—It says that if the plant does not come up to the guaranty, that it shall be dismantled at the expense of the plaintiff and removed. To that extent it is an option. If the plant were to perform all of the guaranties, it would leave [206—69] no option on our part.

Mr. SEABURY.—That is the difficulty, if your Honor please, with that type of construction of that

(Testimony of J. H. Cox.)

contract. It seems to me that the protection of the parties absolutely requires that the items be confined to the limits of the contract itself.

Mr. ELLINWOOD.—Counsel is seeking protection of the plaintiff and not of both parties to this contract.

Mr. SEABURY.—I think not. If the defendant required protection in that respect, I think it was clearly its duty to insert in the contract such provisions as it wanted.

Mr. ELLINWOOD.—That provision there was just about what was wanted.

Mr. SEABURY.—Under that construction I should think it might be.

The COURT.—Now, it seems to me that your question should be confined to the intention of the parties at the time they entered into the contract.

Mr. ELLINWOOD.—Except that it is best to show it was intended by the parties to give better results than the plant that they then owned and were operating. That was the intention of the parties.

The COURT.—I sustain the objection and exclude the answer and the question as formed.

Mr. ELLINWOOD.—Note our exception.

The COURT.—I think it goes beyond ascertaining what the intentions of the parties were at the time the negotiations were made and tends to vary a written contract sued upon.

Mr. SEABURY.—We move to strike out, if your Honor please, [207—70] all the testimony of this

(Testimony of J. H. Cox.)

witness thus far given in response to questions of Mr. Ellinwood along those lines relating to the functions which the parties intended the producer to have at the time the negotiations were made. Relating to the intentions which the parties are supposed to have had at the time the negotiations were made.

The COURT.—I decline to do that. I sustain the objection to the question and I exclude the answer to the long question which was framed awhile ago.

Mr. SEABURY.—We respectfully except, your Honor.

Q. The object of this installation of the plant was to produce gas of a commercial value to operate the concentrator mining machinery of the defendant?

Mr. SEABURY.—We object to it, if your Honor please. The object and purpose being clearly set forth in the contract itself, the contract containing no reference to the concentrator of the defendant.

The COURT.—The objection is overruled.

Mr. SEABURY.—Exception.

A. Yes.

Q. With economy?

Mr. SEABURY.—Same objection.

The COURT.—Same ruling.

Mr. SEABURY.—Exception.

A. With economy, of course.

Q. With greater economy than the production of gas by the old plant from coal?

Mr. SEABURY.—We object, if your Honor please, upon the ground that there is no such guar-

(Testimony of J. H. Cox.)

anty in the contract; on the ground that the evidence tends to put into that contract additional requirements which plaintiff is not bound at all to perform and on the ground that it is improper cross-examination. [208—71]

The COURT.—The objection is overruled.

Mr. SEABURY.—We except.

A. Yes, but there were other reasons, as I understood, for making the installation. In other words, that wasn't wholly the reason. There were others as well. After November I was next in Morenci early in December. That is my signature to this letter dated December 27, 1912.

Q. A letter written by you to the Detroit Copper Company under that date?

Marked Defendant's 2 for identification.

Mr. ELLINWOOD.—I would like a telegram from you gentlemen, dated December 30th, 1912, Smith-Booth-Usher Company, signed by A. T. Thompson.

Mr. WRIGHT.—We don't seem to have anything here prior to 1913, Mr. Ellinwood.

That is my signature to this letter under date of December 31st, 1912, signed by J. H. Cox.

Q. What reference has this J. H. Cox, Erection Department?

Mr. SEABURY.—I don't know what the purpose of this is. We object to it.

The COURT.—The objection to that question is sustained.

Q. That's a mistake, isn't it?

(Testimony of J. H. Cox.)

A. No, the business is divided into different departments.

Letter marked Defendant's 3 for identification.

The engines which were to be operated by our gas plant were approximately 1,000 feet from the generators. I couldn't say what was the size of the main. I made no record of it at the time. It is easy for me to say they were more than an inch in diameter. I should say approximately two feet.

Q. You guessed it the first time.

Mr. SEABURY.—We object, if your Honor please, to the statement of counsel. I move to strike it out. [209—72]

Mr. ELLINWOOD.—I withdraw it. The witness is thoroughly competent to answer these questions and it just simply consumes time when he refuses to do so.

Mr. SEABURY.—Nor do I think the criticism is at all proper or appropriate from counsel, and I ask the Court to instruct the jury to disregard them.

The COURT.—Gentlemen of the jury, you will disregard the remarks of counsel in that respect.

I arrived in Morenci on or about the first or second of April, I am not certain as to the exact date. The plant had been operated when I arrived. It wasn't in operation when I saw it for the first time for the reason that it was shut down overnight. I am not certain when it was first operated after I arrived in Morenci, whether it was the first day that I arrived or the second day, but very soon after I arrived. I couldn't state as to the exact number of hours or

(Testimony of J. H. Cox.)

time it was then operated before it was shut down. There was some operation to determine some conditions which weren't exactly right in the producers.

I couldn't say how many times before I left Morenci it was started and stopped because the plant was operated very little during the night shift. The usual shift there was about eight hours.

Q. How many days or hours was it in operation during the time you were there?

A. I made no record of the exact number of days, because there were some—

Q. No guess—may it please the Court, if he don't know, I don't want the answer.

The COURT.—Mr. Witness, can you answer the question?

Q. Answer my question and when you have answered it, I am satisfied.

The COURT.—I suggest to counsel that whenever they really believe that a witness has not answered their question, that you simply [210—73] ask for the question to be re-read and answered. Read that question Mr. Reporter.

(Question read.)

The COURT.—Now, answer the question if you can and if you don't know say so, and if you know approximately, say approximately.

A. I don't know how long it was operated. The longest continuous operation I recall during the month of April which I was there in one unit was something over 24 hours, but I couldn't say just how many. In three units it was the same number of

(Testimony of J. H. Cox.)

hours. I got there about the first of April. I did not when I first arrived make these changes that I speak of in the machinery, it was several days before I determined just what changes to make. I stated that this scheme of washer was in use in Los Angeles. I saw it in use there. I don't think the changes I made in the machinery and the baffles, washers, were in the Los Angeles plant. I wouldn't so term these changes as an invention but it was my own method of getting—I would term it my method of producing the results that I sought for in the operation.

The washer I copied from Los Angeles was not satisfactory as installed in Morenci in one particular. The particular in which I changed it. I was then experimenting in putting baffles and closing orifices and enlarging others to get a better result in the generator. I found a gasket had blown out. I didn't find any leaks through the faulty castings or poor material or workmanship or anything of that kind. The leak was a gasket between a couple of machine joints. There was such a leak in each one of the units. That entailed on my part the moving of the producers proper or generator part of the producer from the washer and putting in the new gasket. I had to dismantle a part of the plant.

The header which was connected with the three units was connected by a pipe of ten inches in diameter, I think, with the mains of the company at the time I arrived in Morenci. So that from this header [211—74] there was a ten-inch pipe running into the mains of the company, with the valve which was

(Testimony of J. H. Cox.)

closed off when I arrived. That main is connected from the entire system, the large 15,000 foot holder as well. It is not a fact that in order to avail myself of this holder, all that would have been necessary, would have been to have raised that valve, because other gases would have been going in at the same time unless the other connection was blanked off. Even as far as the connection with our plant was concerned, it was not connected up so that it could be used individually. It was not installed and connected with our plant for the purpose of using it. My understanding from the superintendent that when it was necessary to blank off or use a blanked gasket, a middle gasket, as I understand, to shut off the supply from the other plant before this holder could be used for our purpose. The purpose of connecting our plant with this ten-inch pipe with the mains of the company in the holder was that the holder could be used when the other connection was blanked off. I did not anticipate two holders in connection with our plant. I have seen in my experience in the gas business relief holders used in domestic gas. I didn't contemplate any such erection in Morenci.

Recess to Monday, January 26th.

If I had turned the gas permanently into the large holder, using it exclusively for my experimental purposes, the effect on the gas plant of the defendant then in operation would have been of regulating, evening the pressure on the producers and also of thoroughly mixing the components of the gas. The gas I was making.

(Testimony of J. H. Cox.)

Q. If these gas-holders were used exclusively for your use, what would have been the result as to the operation of the mine plant during this period?

Mr. SEABURY.—We object to it as incompetent, irrelevant and [212—75] immaterial, it not being material what the result would be. We claim the contract required the defendant to supply plaintiff with a 15,000 foot holder for the purpose of testing the gas. Mr. Ellinwood asks what the effect would have been on the mining operations. It is immaterial what effect it would have had.

Mr. ELLINWOOD.—We are trying to arrive at the intention of the parties under the contract with reference to this holder. It is the purpose of this question to show that during this period of experiment, when the gas of the plaintiff was turned into the large holders, if this had been turned over to them, it would have shut down the plant entirely, the operations of the Detroit Copper Co., and certainly that never could have been the intentions of the parties.

Mr. WRIGHT.—I refer the Court to page 4 of the contract; the purchasers agree to furnish, among other things, a 15,000 foot gas-holder. On page 3 of the contract under the company guaranty in which the quality of the gas, the amount of suspended matter to be contained in the gas, the following clause is found: "samples of gas to be taken from main, after leaving holder." What holder does that mean? The holder described in the contract and the holder the defendants were to furnish. It was certainly within the

(Testimony of J. H. Cox.)

contemplation of the parties on the face of the contract that a 15,000 holder was to be furnished in order that any test could be made.

Mr. ROSS.—This witness has stated on direct examination that the quality of that gas after leaving the 15,000 foot holder and 1500 foot holder, there would be hardly an appreciable difference in suspended matter. They claim here the only method of finding out is by using a 15,000 holder. He has stated on his direct examination that the difference between the 1500 and 15,000 foot holder, as far as test purposes are concerned, was immaterial. [213—76]

The COURT.—The objection is overruled.

Mr. SEABURY.—Exception.

A. As to the result of the main engines at the powerhouse, I couldn't answer, I don't know what that result would be, but as to the result of the other, if the gas were furnished to that holder, would go on to the mill engines, the engines might be kept running with the gas from that holder.

Q. Do you contend that during the period between the 27th of March and the 6th of May, that the plant of the defendant could have been run with the gas that you produced?

Mr. SEABURY.—We object to it as immaterial and not proper cross-examination.

The COURT.—The objection is overruled.

Mr. SEABURY.—We except. May I add a further ground of objection?

The COURT.—Yes.

(Testimony of J. H. Cox.)

Mr. SEABURY.—Upon the ground that there is nothing contained in the contract which requires the apparatus furnished by plaintiff to run any particular engine or plant of the defendant not contained within the contract.

The COURT.—Very well.

A. The engines could have been run on the gas while the gas was being made.

Between the 27th of March and the 6th of May gas was being made by our plant approximately eight hours per day, except the days in which we were making the changes on the washers.

Q. How much time did you expend in making the change on the washers did you say, ten days?

Mr. WRIGHT.—May it please the Court, the contract provides that the whole period of 90 days subsequent to the completion of the erection of the plant was the period in which the plaintiff might make such an adjustment as might be made, and it is totally immaterial what part of the time was taken up with these tests. [214—77] That was one of the purposes of the 90-day trial, to allow adjustments to be made. The changes were made during the time. The contract specifically states that. It is totally immaterial what portion of that time was taken up with those changes. We object to it on that ground.

The COURT.—Overruled.

Mr. SEABURY.—We except.

A. Approximately so; I don't remember the exact number of days. These adjustments of which I have been testifying were completed some time near the

(Testimony of J. H. Cox.)

last of April; I don't remember the date. Approximately, about the 25th of April, 26th.

Q. About the 6th day of April, did you have a conversation with Mr. John McDoigall and Mr. George Douglas at the plant that you were erecting, in which you said that you were unable to go further with the plant and asked them as representatives of the Detroit Copper Company to take the same over and experiment with it themselves?

Mr. SEABURY.—We object to that as being incompetent and immaterial improper cross-examination, no proper foundation having been laid for the impeachment of the witness, and not being a proper subject of impeachment.

Mr. ELLINWOOD.—The purpose of the question is to direct his attention to the time and place of the conversation. Now, may it please the Court, the counsel in his argument repeatedly stated this was the authorized representative of the company and the one we were doing business with. There is no question about that.

Mr. WRIGHT.—If you will recall our statement, your Honor, Mr. Cox went to Morenci for the purpose of testing this plant which had been erected prior to his arrival, but had no authority from this plaintiff to make any changes or any modification or any agreement, or to change the conditions under which the contract was to be performed. He was there simply for the purpose of [215—78] making tests of that plant, and further than that, nothing has been shown in evidence.

(Testimony of J. H. Cox.)

Mr. ELLINWOOD.—May it please the Court, I am thoroughly astonished at the statement of the plaintiff's counsel, after a solemn statement of counsel, Mr. Seabury, that he was the authorized representative of the company. That has been the theory of the case from start to finish.

Mr. SEABURY.—I have no recollection of making any such statement.

Mr. ELLINWOOD.—Well, it is in the record.

Mr. SEABURY.—There is no doubt, if your Honor please, as to the witness' authority to go there and make an adjustment.

Mr. ELLINWOOD.—If this witness has testified that this plant is complete and performed the function for which it was contemplated and then has made statements such as I shall interrogate him about, it is very material in this case.

The COURT.—It will be admitted for the purpose of going to the witness' credibility only.

Mr. SEABURY.—We respectfully except to its admission for any purpose.

The COURT.—Very well. Answer.

Q. I am asking you if you had such a conversation—I'll state it is susceptible to a very brief answer.

Mr. SEABURY.—We think that where counsel assumes to state what the conversation was, he cannot be expected to answer yes or no.

The COURT.—Can't he say yes or no?

Mr. SEABURY.—If he says yes, then he is bound by the alleged conversation as stated by Mr. Ellinwood. There may have been a conversation and it

(Testimony of J. H. Cox.)

must have been exactly as stated by counsel.

The COURT.—Then he can state no. Or if he desires to qualify or explain, I instruct the witness he has that privilege. [216—79]

A. I had a conversation on or about that date with those gentlemen as I did almost every day, but the conversation related to this: I stated that I couldn't make the gas cleaner than I was making it at that time and they insisted that the gas be made cleaner and I told them that they might have the privilege of trying it themselves, if they wanted to try to make it cleaner, but with the present apparatus, I could make it no cleaner than I was doing at that time. That statement now is the conversation, as I remember it, that took place at that time. My conversation is the conversation that really took place. It wasn't verbatim the conversation which you stated.

Several times while I was experimenting with this plant I asked the defendant for a large holder to use in connection with my experiments. It was not given me. It never was given to me to use individually for that plant. It was never given to me to use individually. I turned the gas into the system on three different occasions but not into the holder. I didn't ask for the small holder until it was offered to me by Mr. Le Grand. I stated to Mr. George Douglas and Mr. McDougall at that time that it would be necessary to have something, some means of measuring the quantity of gas, that it could only be measured by a holder. That was the only purpose for which this small holder could have been used.

(Testimony of J. H. Cox.)

It wasn't for the purpose of cleaning the gas. The one unit was so piped that the gas didn't go through the holder; it simply was floated on the line. We didn't furnish all the specifications for the piping, for control of the piping as the piping was mostly in, but we merely made a temporary connection. All of the new work I did.

Q. All the work you were putting in there was the new work, wasn't it?

A. Your Honor, may I answer that and qualify and describe which was new work and which was not?

The COURT.—Can't you say, "No, it was not," and then describe it— [217—80] can't you answer that question?

A. No, no; it was not in this particular case, as this holder had been used for other purposes and there was approximately 50 feet of pipe that was already in and I merely made a connection with the header with the small pipe to this old pipe which was in, which I utilized. I had then control not only over the work I was putting in, but I utilized some of the pipe already laid to the small holder.

I had charge of the piping and of the connection; I was installing that plant there.

I specified a different connection that should be installed than this small holder, as follows: I wanted a connection to the outside of the holder so that the gas might go through the holder and be turned on the outside, but when we tried to open it up, the gas valve was so that this couldn't be opened. One of the functions of a gas-holder is to measure the

(Testimony of J. H. Cox.)

quantity of the gas—I'll take that back—the functions of a holder is this: In this system it requires a burn-out period of day a few minutes which a holder becomes necessary to create a reserve to keep the engines running during this burn-out period. Then to give an even pressure upon the pipe-line system, keep an even pressure on the plant, and further to allow the gas to become at rest to a low velocity and thoroughly mix the components of the gas. That is, if one unit was running high or low, one unit might be running a few per cent off from the perfect mixture that we would want and another unit might be running enough higher or lower in the opposite direction to that to even up, and the gas after mixing in the holder would become uniform.

The plant as I found it there had a holder installed in connection with the old plant which I was told had a capacity of 15,000 feet. I do not know how much gas they were making there then to run the plant. I am a gasman, that is my business, [218—81] but I have no connection with their gas plant.

Q. Now, I'll ask you if you had a conversation, Mr. Cox, with Mr. Le Grand about this same time and place, concerning this small holder in which you said to Mr. Le Grand that you would like to have a holder to connect with the plant so as to get a steadier pressure and also to give you the means of measuring the quantity of gas?

A. I made that request several times.

Q. Did Mr. Le Grand ask you if the small holder

(Testimony of J. H. Cox.)

would be all right to which you said it would be satisfactory?

Mr. SEABURY.—We object to it as beyond the scope of cross-examination.

The COURT.—Overruled.

Mr. SEABURY.—Exception.

A. I didn't state that the holder would be satisfactory. In my experiments with that plant I did at some time produce gas that was fit to be put in any holder. In the month of April I had a conversation in the office of Mr. Thompson, with Mr. Thompson, in which he took up with me the matter of the expense that was being incurred in carrying on these experiments.

These words "O. K., J. H. Cox," were made by me on this paper under date of May 6th purporting to be a bill of the Detroit Copper Company.

Mr. ELLINWOOD.—Will you please mark that for identification?

Marked Defendant's 4 for identification.

I can identify this other bill which purports to be a bill of the Smith-Booth-Usher Company to the Detroit Copper Company as being a bill coming from our office.

Marked Defendant's 5 for identification.

I see a letter under date of Los Angeles May 20th, 1913, purporting to be from the Smith-Booth-Usher Company to the Detroit Copper Company, purporting to be signed Smith-Booth-Usher Company, L. M. Shockley. I don't know the handwriting of L. M. Shockley. I [219—82] couldn't swear to the

(Testimony of J. H. Cox.)

signature. I know Miss Shockley. I have seen her write, but I paid no attention to her signature, and I couldn't identify her signature. I had very little correspondence with Miss Shockley.

Mr. ELLINWOOD.—We will defer this until we can identify it more accurately.

Q. I'll ask you, Mr. Cox, if you know as a matter of fact whether the bill spoken of in regard to expense and labor was paid by the Smith-Booth-Usher Company.

Mr. SEABURY.—We object to that first on the ground that it is incompetent, irrelevant and immaterial, without the issues of the pleadings, and also on the ground it is assuming a fact not in evidence at the present time.

The COURT.—The objection is sustained.

Approximately, on May 6th I had a conference with Mr. Thompson at his office regarding this plant.

Q. At that time and place did you state to Mr. Thompson that you had done everything you could in connection with the plant as it stood and saw no use of staying there longer?

Mr. SEABURY.—We object to that, if your Honor please, as to form, inadmissible under the pleadings and not proper cross-examination and being exactly similar in character to the questions already framed by counsel, which, as I recall it, your Honor sustained the objection to.

The COURT.—The objection is overruled.

Mr. SEABURY.—We except.

A. Am I to answer that yes or no?

(Testimony of J. H. Cox.)

The COURT.—If you can you are. If you can you can make any explanation after answering it. I cannot tell you how you are to answer questions, except that you ought to answer it as asked, if you can; if not, state why.

A. I did state to Mr. Thompson that I was unable to wash the [220—83] gas any cleaner than I was doing at that time; that there was no use for me to stay during the interval of the engineer's trip to inspect another plant.

Q. Then didn't Mr. Thompson state to you or ask you if you claimed you were making a satisfactory gas as far as the soot was concerned and you stated to him that you were not?

Mr. SEABURY.—Same objection, if your Honor please.

The COURT.—Same ruling.

Mr. SEABURY.—We except.

A. I said to him that I couldn't make it any cleaner than I was at that time.

Q. Did you state as I have put the question to you? A. Not exactly, no.

Q. Didn't you then say to Mr. Thompson that you wished to install a mechanical or rotary washer which you knew would clean the gas?

Mr. SEABURY.—We make the same objection, if your Honor please, particularly as to the form of the question. We see no reason why counsel should not ask the witness what, if any, conversation he had.

Mr. ELLINWOOD.—I've got to lay the foundation.

(Testimony of J. H. Cox.)

Mr. SEABURY.—We don't understand that it requires counsel to state the substance of the alleged conversation, nor do we understand that it will be proper later for counsel to contradict the witness in that regard.

The COURT.—That is one of the rules laid down by the Supreme Court of the United States in the cross-examination of a witness to lay the predicate for impeachment and it is upon that theory that I am admitting this.

Mr. SEABURY.—As I recall it, on direct examination we tried to get from this very witness statements or the substance of this very conversation he had with Mr. Thompson prior to his departure [221—84] from Morenci, and my recollection is that it was all excluded so that this matter now is beyond the scope of the cross-examination.

The COURT.—I don't recall that evidence along this line was excluded; that is evidence of conversations between this witness and Mr. Thompson.

Mr. SEABURY.—I may be in error in regard to that, but my recollection was we had asked it and it was excluded.

The COURT.—As I remember it, the evidence excluded was evidence objected to upon the ground that it sought to vary the terms of the written instrument.

Mr. SEABURY.—I think I asked the witness what were the surrounding circumstances connected with his departure from Morenci and certain conversations and I was under the impression that this

(Testimony of J. H. Cox.)

had been kept out.

The COURT.—The objection is overruled.

Mr. SEABURY.—Exception.

A. I did.

Q. Didn't then Mr. Thompson state to you that if you had a further proposition to submit that he wished you to put the same in writing?

Mr. SEABURY.—We make the same objection, and in addition to that, this tends to relate to a modification of the contract. No modification of the contract is pleaded either by plaintiff or defendant.

The COURT.—I sustain the objection.

Q. I'll ask you, then, Mr. Cox, if immediately after this conference you didn't write a letter to the Detroit Copper Company of Morenci under date of May 6th, 1913?

A. I remember writing a letter to them, yes.

Q. I'll ask you if this is the letter that you wrote?

A. Yes, sir. [222—85]

Mr. ELLINWOOD.—I now offer this in evidence. Defendant's 6 for identification.

Mr. SEABURY.—We object to the offer, if your Honor please, upon the ground first that it is inadmissible as cross-examination of this defendant. Second, upon the ground that there is no authority or power in this witness to change, alter, or modify any of the terms of the written contract by the parties in this case; further, upon the ground that the statements contained in the answer do not relate to an installation as required by the terms of the contract, but is merely an effort to endeavor to satisfy

(Testimony of J. H. Cox.)

the defendant in other respects, which in this connection are wholly immaterial. Those are the only grounds that have occurred to me except on the general ground that it is inadmissible under the pleadings.

Mr. ELLINWOOD.—Pending this offer, may it please the Court, I would like to submit another letter contemporaneous with this.

The COURT.—Is it your idea that you may at this time introduce evidence?

Mr. ELLINWOOD.—I think I can if it will contradict his statement.

The COURT.—Any written instrument, any letter which he may have written, introduce it at this time as part of your case.

Mr. ELLINWOOD.—I think so as part of the cross-examination, whether it would be oral or whether it would be written. I might read that to him and ask him if he didn't write such and such a letter and he would say yes. Before I go farther I would like to offer another letter.

I see a letter under date of Los Angeles, May 24, purporting to be signed by the Smith-Booth-Usher Company, S. J. Smith, President. I know Mr. Smith's signature. I think that is his signature. I would cash a check with that signature on it. This is his signature, I believe.

Defendant's 7 for identification. [223—86]

Mr. ELLINWOOD.—Now, may it please the Court, I renew the offer in evidence of the letter of May 6th, together with this letter of May 24th.

(Testimony of J. H. Cox.)

Mr. SEABURY.—We will interpose no objection to the second offer, that is to say, of the offer of the letter of May 24th signed by Mr. Smith, president of the plaintiff company.

Mr. ELLINWOOD.—Our statement is that if there was ever any question about the authority of Mr. Cox in the matter, it is now precluded by the letter of the company which takes up the same subject matter and reviews it and shows under whose authority Mr. Cox was acting and why he was acting.

Mr. SEABURY.—We don't think it shows that, your Honor. We think it shows that where advice is received by Mr. Smith from Mr. Cox that some conversation had taken place and the letter expressly says I now desire to take up with you what you are to do.

Mr. ELLINWOOD.—For a minute, I'll withdraw it.

Q. Mr. Cox, subsequently to writing this letter of May 6th, had you any conference with Mr. Smith on the subject?

Mr. SEABURY.—We object to it, if your Honor please; we don't think that would have been permitted for a moment on direct examination. We object to the question as being improper and inadmissible.

The COURT.—I sustain the objection.

The COURT.—Am I correct in my recollection that this witness is the person who sold this plant to the defendant company?

(Testimony of J. H. Cox.)

Mr. ELLINWOOD.—Yes, sir; the letters already in evidence show that leading up to the negotiations he was representative of the company that sold the plant.

Mr. SEABURY.—He was representative as far as being a salesman is concerned, but the contract wasn't entered into by this witness, but the negotiations were entered into by Mr. Smith who was president of the company. He never signed any contract which [224—87] bound the company in any way.

The COURT.—Well, I can only admit this letter as going to the credibility of the witness, as showing at that time, what he admitted to be the condition of the plant and any proposition which it may contain. With reference to the modifications of the written contract, it will not be received at this time upon the ground that there is no authority shown in this witness as representative of the Smith-Booth-Usher Company to make any such modification in the original contract.

Mr. ELLINWOOD.—May it please the Court, it seems to me there is a distinction there between the power of the witness to make a modification of the contract and the power of the witness to make a proposition to modify the contract which was in fact accepted. What he said in connection with this thing seems to me would go to his credibility and what he thought of the situation.

The COURT.—That is the theory upon which I am admitting it.

Mr. ELLINWOOD.—And we will take the other

(Testimony of J. H. Cox.)

part up later in the examination.

Mr. SEABURY.—We respectfully except to the admission of the letter at this time for any purpose, particularly, upon the ground that I don't understand that there has been any offer of it for the purpose of affecting the credibility of the witness, nor do I understand that at this time the evidence of the witness can be subject to being affected by the question of his credibility.

Mr. ELLINWOOD.—Is this witness beyond the rule?

The COURT.—I think the better practice would be to ask such question as to the letter as you desire and that you introduce the letter on your case.

Mr. ELLINWOOD.—This letter of May 26th, May 24th, was admitted without objection.

Q. Mr. Cox, in that letter that you testified you wrote on [225—88] May 6th, did you state “in reference to the crude oil gas-producer which we furnished you on our contract, dated December 5th, 1912, I beg to advise that in making this, we adopted a new type of washer which had every promise of cleaning the gas better than any installation we had ever made, without the use of mechanical apparatus. After a series of tests, however, we find this static scrubber does not clean the gas as clean as you desire for your long pipe-lines—?”

Mr. SEABURY.—We object to it, your Honor, as incompetent and on the grounds already urged.

The COURT.—Overruled.

Mr. SEABURY.—We except.

(Testimony of J. H. Cox.)

A. I did.

Q. Didn't you at that time in that letter also request an extension of time in which to install such mechanical scrubber?

Mr. SEABURY.—We object to that on the ground already urged, and on the further ground that the letter having now been received in evidence is the best evidence of its contents.

Mr. ELLINWOOD.—I haven't read the letter.

Mr. SEABURY.—The letter is in evidence. It has theoretically been before the jury.

Mr. ELLINWOOD.—Do you object to my reading it before the jury?

Mr. SEABURY.—I made my objection and it has been overruled.

The COURT.—No, I haven't admitted it in evidence in the case. I permitted him to read it to frame his question from it and unless he introduces the letter on defendant's behalf, it will not be received in evidence at all.

Mr. SEABURY.—I understood, your Honor, that the record showed that the letter was offered and I objected upon the various grounds stated. The objection was overruled in part and sustained in part. Part of it was admitted. The letter was admitted with the qualification that it would be received only as tending to [226—89] affect the credibility of the witness.

The COURT.—Is that your understanding?

Mr. ELLINWOOD.—I had supposed that you stated it really ought to go in our case, that is as

(Testimony of J. H. Cox.)

a whole, but that I could ask him any questions as to what was contained in the letter and what it stated.

The COURT.—Then on your own case in support of your defense, you may, if you so desire, introduce the letter, but I don't at this time admit the letter, because I don't think this is the time for introducing it.

Mr. SEABURY.—I don't either, your Honor, and it has been the substance of my objection.

The COURT.—Technically, it might not be improper, but I think the rule is to frame your question, identify your letter and then if you so desire, introduce that letter in support of the defense.

Mr. SEABURY.—Then if my understanding is incorrect about the letter not having been received in evidence, I desire to object to this question upon the ground that it purports to be based upon something in writing which is not in evidence and purports to call for contents of a letter not in evidence.

The COURT.—I overrule the objection.

Mr. SEABURY.—We except.

Q. I would like to ask you, Mr. Cox, if at this time, in this written communication, you did not state: "We ask that you grant us an extension of time, that we may dispense with the present horizontal static scrubber, go back to our vertical type and in addition thereto install a mechanical scrubber such as we are now using at El Centro, which we are advised by the manufacturers will consume 10. H. P. for the 600 H. P. plant, which is approximately

(Testimony of J. H. Cox.)

1.67% of the total power generated. Delivery of this washer can be made F. O. B. Buffalo in six or eight weeks''?

Mr. SEABURY.—We make the same objection to that last question. [227—90]

The COURT.—In connection with this witness' testimony on direct examination, I will admit that question for the purpose of going to his credibility and not for the purpose of showing any modification of the contract.

Mr. SEABURY.—We respectfully except, your Honor, to the qualified admission of the letter on the ground, particularly, that the credibility of this witness is not yet and could not yet be in issue in this case.

The COURT.—Overruled.

Mr. SEABURY.—Exception.

The COURT.—Now, in order that the record may show, it is admitted as tending to affect the credibility of the witness, I mean laying the foundation for the question, which might tend to impeach or go to the witness' credibility.

A. I did make the statement as read. I had a conversation with Le Grand regarding this plant, in the presence of Mr. George Douglas and Mr. Ensign on the evening of May 5th, on the veranda of the Hotel Morenci, at Morenci.

Q. Did you at that time state that you had gone as far as you could with the apparatus as installed?

Mr. SEABURY.—We make the same objection as already urged.

(Testimony of J. H. Cox.)

The COURT.—Same ruling.

Mr. SEABURY.—We except.

Q. Or perhaps the exact words that you had “reached the end of your rope.”

Mr. SEABURY.—Same objection.

The COURT.—Same ruling.

Mr. SEABURY.—Exception.

A. I made that statement regarding the cleaning of the gas. No, I didn't ask Mr. Le Grand to allow me to install a rotary or centrifugal washer.

Q. Whom did you ask? [228—91]

Mr. SEABURY.—We urge the same objection.

The COURT.—Same ruling.

Mr. SEABURY.—Exception.

A. I asked no one at that time. I asked Mr. Thompson later. The question of a rotary or centrifugal washer was discussed at that time, not by myself but by Mr. Le Grand and Mr. Ensign. Mr. Ensign is the inventor of the gas plant. He was the inventor of this gas-producer; it is called the Amet-Ensign producer. That is my signature to a letter under date of November 20th, 1912, to A. T. Thompson, general manager, signed J. H. Cox, Smith-Booth-Usher Company.

Mr. ELLINWOOD.—I ask to have that marked for identification.

Defendant's 8 for identification.

That is my signature, I wrote that letter dated Los Angeles, January 2d, 1913, to the Detroit Copper Company, purported to be signed Smith-Booth-Usher Company, J. H. Cox.

(Testimony of J. H. Cox.)

Mr. ELLINWOOD.—Please mark that for identification.

Marked Defendant's 9 for identification.

I wrote that letter under date of Los Angeles, February 8, 1913, addressed to A. T. Thompson, Morenci, Arizona, signed J. H. Cox.

Mr. ELLINWOOD.—I'll ask you to mark that for identification.

Marked Defendant's 10 for identification.

That is my signature to that letter under date of Los Angeles, January 22, 1913, to the Detroit Copper Company, Morenci, purporting to be signed by the Smith-Booth-Usher Company, J. H. Cox. I wrote that letter.

Mr. ELLINWOOD.—I ask to have that marked for identification.

Marked Defendant's 11 for identification.

I do not know what the diameter of the small holder is. I made some measurements of the quantity of gas put in the holder. I made it by timing the holder as it was rising. By timing the holder as it was rising by the second hand of my watch. I took for [229—92] granted the holder was a certain capacity, of which I am not absolutely certain now of that capacity, but I made no measurement of the cubical contents myself. The capacity was represented to me by Mr. McDougall. I don't remember exactly the number of cubic feet. If I were told that a holder was of ten thousand cubic feet or five thousand or seven thousand, that would probably not *not* enable me to tell the quantity of

(Testimony of J. H. Cox.)

gas I was making without knowing the diameter of the holder, but I wasn't using the holder at that time for the purpose, and had I done so later I might have taken the diameter of the holder. I couldn't use it for that purpose but for one unit. Yes, I testified that to measure the gas was one of the purposes of getting the holder. I did make some measurements, timed the holder as to the time required to fill it.

Q. Do you know, Mr. Cox, of your own knowledge, whether at any time from the starting of the plant on the 27th of March, to the 6th of May, it produced gas of at least 190 feet B. T. U. low value for each gallon of oil fired, quality uniform within a range of 5 B. T. U.?

A. I don't positively, further than the chemical analysis shown me by the chemist who was making the test. I was in the room when one of the tests were being made and saw him write down his figures.

Mr. ELLINWOOD.—That's all.

Redirect Examination.

(By Mr. SEABURY.)

Q. Now, what figures did you see him write down?

A. I saw him write down the figures of the chemical analysis showing the—

Mr. ROSS.—We object to that. We asked him whether he knew or not and he said he didn't know, except hearsay knowledge of it. Now, counsel is asking for his hearsay knowledge. It is incompetent.

Mr. ELLINWOOD.—Another thing, he said there

(Testimony of J. H. Cox.)

was figures and [230—93] I presume he would have to produce the figures.

Mr. WRIGHT.—Is that the ground of the objection that the figures should be produced?

Mr. ELLINWOOD.—It is one; we will produce all that we have got with pleasure.

The COURT.—I think the objection is a good one. I'll sustain it.

Mr. SEABURY.—We except.

At the time I saw the expert of the defendant make this analysis I made some figures and wrote down some of the alleged analysis disclosed to me by the expert of the defendant, not all.

I have two memoranda of those figures which I made at that time. They are in my possession. I copied the figures as given to me by the chemist and made the figures myself. Dr. Sanberg was the chemist.

Q. Now, if you have a memorandum of those, I wish you would produce it and I ask you, whether by reference to that memorandum, your recollection is refreshed as to the detailed statement of the analysis made to you at that time by Dr. Sanberg.

Mr. ELLINWOOD.—We make the same objection, as hearsay. We tested this witness' personal knowledge. Now, upon that basis they seek to ask him hearsay. Dr. Sanberg is here if they want to call him as a witness.

The COURT.—I sustain the objection.

Mr. SEABURY.—Exception. May we have for the purpose of inspection, the various letters here?

(Testimony of J. H. Cox.)

The COURT.—Yes.

Mr. SEABURY.—If your Honor please, this witness is going away to-night and by going over those letters, we may admit some of them.

The COURT.—Very well.

Continuation of Redirect Examination by Mr.

WRIGHT. [231—94]

I meant by the expression that when connected with the small holder it was floating on the line, that there was no outlet through the holder and the gas would necessarily go to the holder and return again through the same pipe; there was no passage through. In other words, you fill the holder and open the valve and let the gas out through the same pipe in which it entered. In the installation of this gas-producing plant, the pipes which connected the producers with this small holder were only of a temporary part of the installation of which I had charge. They were not included in the installation of the plant as I took it up for the purpose of furnishing the producers to the Detroit Copper Company.

Q. Now, you stated, Mr. Cox, that you made measurements of the capacity of one unit of the holder; what did you find to be the capacity of one unit?

A. Beyond the one-third capacity of the six hundred horse-power.

Mr. ELLINWOOD.—We object to that answer as being not responsive and ask that it be stricken out. If this witness has any definite knowledge on that subject, these questions are designed to elicit it. It is always by way of comparison. It is more

(Testimony of J. H. Cox.)

than it should have been. Or not as good as it should have been because of some circumstance.

The COURT.—I'll permit you to re-examine him on that. The objection is overruled. Or rather the motion is denied.

Mr. ELLINWOOD.—Exception.

Q. When you made a measurement, Mr. Cox, on the ground, of the capacity of the one unit, will you state whether or not that capacity exceeded ten thousand cubic feet per hour?

Mr. ELLINWOOD.—We object to it as assuming a fact not in evidence. It does not appear this witness ever made a measurement. He said it would be impossible for him to make the measurement without knowing the diameter of the holder and he said he didn't [232—95] know the diameter of the holder.

Mr. WRIGHT.—I beg your pardon; upon further examination he stated he did make a measurement of one of the units of the producer, but not of the full producer.

Mr. ELLINWOOD.—Made a measurement of one unit, but admitted he couldn't tell the quantity or capacity of the gas without knowing the capacity of the holder which he said he did not know.

The COURT.—In order to keep the record straight, I'll permit you to ask him whether or not he did make the measurement.

I had a conversation with Mr. McDougall concerning the cubic contents of that holder shortly after I reached Morenci. I had that conversation at the

(Testimony of J. H. Cox.)

plant. Mr. McDougall told me at the time what the cubical contents of the holder was and I had no reason to doubt it, therefore made no check up of the cubical contents. I remember that he told me at that time that it was 5,000 feet, as I understood it. I don't recall the exact figures as to the length of time which it took to fill this holder, operating one unit of the gas-producer.

Q. Do you remember approximately?

Mr. ELLINWOOD.—I think approximations are pretty dangerous when we are dealing with exact figures in the contract. We object to it approximately. These things are susceptible of being determined. An expert on the stand should not be permitted to approximate.

Q. Have you figures which will show that, did you make any memorandum at that time, Mr. Cox?

A. I made a memorandum at that time, but I moved twice since then and lost most of my figures—notes on it and I was trying to see if I could find something that I could give the exact figures. I expected to return to Morenci again and therefore I didn't keep the notes as carefully as I might have done otherwise. [233—96]

Q. What is your recollection, Mr. Cox?

The COURT.—He says he doesn't remember.

Recess.

Continuation of Redirect Examination by Mr.

SEABURY.

Q. I direct your attention to a bill which has been marked for identification Defendant's Exhibit

(Testimony of J. H. Cox.)

4, which purports to be a bill dated May 6th, and ask you to look at it and tell us, what, if any, explanation you have to make with reference to the bill.

Mr. ELLINWOOD.—That is not in evidence yet. If counsel will put it in evidence, we have no objection.

Mr. SEABURY.—I don't think it is, but he was asked the question concerning the bill.

Mr. ELLINWOOD.—We have no objection as long as it is in evidence.

Mr. SEABURY.—I don't wish to offer the bill, but I wish to offer such explanation as the witness may give concerning it, especially at this time because of the probable departure of the witness tonight. He may or may not be required to go.

Mr. ELLINWOOD.—I suggest that inasmuch as you received a bill of that kind you put it in evidence.

Mr. SEABURY.—Of course, the bill doesn't constitute any part of my proof, your Honor.

The COURT.—I would like to accommodate the witness, but I can't permit you to examine him on anything you don't want to introduce. That was the very objection you made.

Mr. SEABURY.—True, but I didn't know I had been successful in that objection, your Honor.

Mr. SEABURY.—For the purpose of the record, then, I'll ask him to state the explanation, if he has any to offer, and if Mr. Ellinwood asks—

Mr. ELLINWOOD.—I object to any explanation

(Testimony of J. H. Cox.)

concerning any [234—97] evidence which has not been received.

The COURT.—The objection is sustained.

Mr. SEABURY.—Exception.

Q. I direct your attention, Mr. Cox, to Defendant's Exhibit 5 for identification and ask you what, if any, explanation you have to make of that bill.

Mr. ELLINWOOD.—Likewise I object to any explanation until the letter is in evidence and tender the letter to counsel for the purpose of putting it in evidence.

Mr. SEABURY.—I might say in response to that tender of Mr. Ellinwood that I have no objection to his offering it at this time, if he desires to offer it as part of his case, subject only to my objection as to its relevancy and competency and admissibility, but not as to the time in which he offers it.

Mr. ELLINWOOD.—Then I wish to put all of those letters in evidence if I put one in.

The COURT.—I ruled that you could not do that; I ruled on the plaintiff's objection that you could not do that at this time. Now, if you withdraw that objection, I'll allow it.

Mr. SEABURY.—I withdraw the objection as to the time.

The COURT.—And you objected as to the admissibility?

Mr. SEABURY.—I don't waive the objection as to the admissibility.

The COURT.—I decline to proceed that way, because I haven't examined them.

(Testimony of J. H. Cox.)

Mr. SEABURY.—As I say, Mr. Ellinwood says he wants to offer them now. If he wants to offer them I have no objection to their being offered at this time, except the objection that goes to the competency and admissibility of the evidence, the offer.

The COURT.—Still you want to inquire, not knowing whether the court will admit them in evidence.

Mr. WRIGHT.—Maybe this evidence may be stricken out if you [235—98] offer to admit that the letters are not admitted in evidence.

The COURT.—No, I can't go to that extent.

Mr. SEABURY.—We will stand by the record as it appears now.

Q. Mr. Cox, did you ever say in substance to any one connected with the defendant company, that the apparatus which the plaintiff had installed there, would not do the work in accordance with the contract?

Mr. ELLINWOOD.—We object to the question as entirely too broad. We never could meet that. We would like to have the name of the person or persons and the time and place, so we may meet it.

The COURT.—The objection is sustained.

Mr. SEABURY.—I except.

Mr. SEABURY.—Now, I ask permission to ask this witness a question, your Honor, which he properly should have been asked on direct.

The COURT.—You may do so and counsel for defendant may cross-examine him on it.

During my experience with these gas engines I

(Testimony of J. H. Cox.)

have had occasion to sell several of them. I am familiar with the value of the apparatus installed.

Q. Will you tell us what, in your opinion, is the reasonable value of the installation made?

Mr. ELLINWOOD.—May it please the Court, we object to that question, for the reason that they are suing on a specific contract for a specific amount. It is true they have a second cause of action in the complaint for goods, wares and merchandise sold, but whenever a written contract is introduced in evidence, then the second count must certainly fail. They are standing on the written contract and showing that there was a written contract between these parties.

Mr. SEABURY.—I don't know whether your Honor cares to hear [236—99] from us or not on that question.

The COURT.—Yes, if you think you are right.

Mr. SEABURY.—We do think we are right. We think plaintiff may bring an action on the contract on one count and join with that an action on *quantum meruit*, and that he might be entitled to recover on the *quantum meruit* and yet stand on the contract.

Mr. ELLINWOOD.—There is no question of the cause of action on the contract.

Mr. SEABURY.—It is not a question of the cause of action, your Honor. There is and will be much conflicting evidence as to who breached the contract. Our position is we performed the contract up to the time the defendant notified us they would not permit us to go farther on the contract.

(Testimony of J. H. Cox.)

The COURT.—If you show that fact, wouldn't you be entitled to recover on your first cause of action?

Mr. SEABURY.—We think so.

The COURT.—Then in what way, under what circumstances and conditions, would evidence on the second cause of action be admissible?

Mr. SEABURY.—Under the general allegations of the complaint that they did supply machinery of the reasonable value of the certain sum in issue in this case.

The COURT.—True, but you are suing upon and have introduced in evidence a written agreement and upon that you are claiming so much money of the defendants. Well, for the present I'll sustain the objection. If you can show me I am wrong I shall be glad to hear from you again.

Mr. SEABURY.—Shall I propound the question or may I show at this time by offer of proof by this witness, the reasonable value of the apparatus supplied by the plaintiff?

The COURT.—I think that is sufficient.

Mr. ELLINWOOD.—Your Honor excludes it.
[237—100]

The COURT.—Under the affirmation of counsel that it is offered in support of the second cause of action.

Mr. SEABURY.—Yes.

The COURT.—Yes.

Mr. SEABURY.—To which we respectfully except.

Q. Mr. Cox, you were asked questions this morning

(Testimony of J. H. Cox.)

concerning the conversation which you had with Mr. Thompson about the 6th of May, 1913; will you please tell us all that conversation now as far as you are able to recollect it at this time?

A. On or about the 6th of May, I was in Mr. Thompson's office. We had a conversation regarding the plant and the trip of their engineer and our operating engineer to inspect a plant at El Centro and these two men were to visit El Centro and report—

Mr. ELLINWOOD.—Mr. Cox, he asked for the conversation. You are stating what these two men were to do. What was said?

A. Mr. Thompson said that he would send Mr. George Douglas, assistant consulting engineer of the company, to El Centro to examine this rotary gas washer, scrubber, that was installed at that place, of which I told him would clean this gas as clean as he wanted it cleaned, and I told him if this was done I would return to Los Angeles and await the report of Mr. Douglas. Mr. Thompson said he would notify me either by letter or by wire as soon as he had the report of Mr. Douglas. Mr. Thompson said that he would prefer that I make a written statement or a written proposal to him regarding which I would advise doing in regard to this additional scrubber. I told Mr. Thompson that if he would give me the use of his stenographer that I would dictate the proposal in his office. He said that he would, that I might use his stenographer to write the letter. I don't recall the words, but we had some conversation

(Testimony of J. H. Cox.)

regarding the length of time it would require to secure this mechanical washer, the rotary washer from the factory and I stated that my advices [238—101] were that this could not be secured in less than seven or eight weeks, shipped from the factory, and allowing about 30 days for transit by rail, it would go on beyond our ninety-day period of trial of the apparatus, and that I would like an extension of time of this ninety-day period to enable me to get this washer and install it. Mr. Thompson stated that he would let me know whether he would grant the time or not upon his report from Mr. Douglas. That is about all the conversation that I remember that took place at that time. I thereafter held myself in readiness to go on with the trial adjustment of the apparatus.

Q. And Mr. Thompson understood that, did he not?

Mr. ELLINWOOD.—May it please the Court, we are getting into this conversation very fully.

Mr. SEABURY.—We offer in evidence a letter dated May 28th, 1913, addressed to the plaintiff in this action and signed by Mr. Thompson, general manager.

Received in evidence and marked Plaintiff's Exhibit "C."

(Read to jury.)

Mr. SEABURY.—I think that's all.

Recross-examination.

(By Mr. ROSS.)

I said I expected to return to Morenci when I left there. I expected to return to continue the period of test of the plant. My expectations were that we

(Testimony of J. H. Cox.)

would install the rotary converter and then I was to complete the 90-day test. No one had promised that he would install a rotary washer, absolutely, no.

They were merely going to investigate; now, if no rotary washer were to be installed, I would, if instructed to do so by Mr. Smith, have gone back there to make further tests with the machinery I already had in place there.

I did not feel that I could do anything more than I had already [239—102] done as far as making the gas any cleaner. Clean gas was Mr. Thompson's desire. I had made the gas as clean as I could with that apparatus. And as far as the cleanness of the gas was concerned, I didn't expect to go back there and try to make any cleaner gas with that machinery than I had already made.

I state that, having in mind the use for which the gas was intended at that time there at Morenci, it could have been handled—it was clean enough. By a system of sprays it could have been used, as there was no longer pipe-line, as I would term a long pipe-line, for this particular plant—as the long pipe-line, which I would term the long pipe-line, led to the main power-house of the company and not to the concentrator or mill engines, as this plant was intended to operate. This gas was to go through a thousand foot pipe-line to the concentrator, after passing the holder. I don't believe that there would have been any stopping there of that pipe-line beyond the holder. I think that it would have been necessary to have used sprays or some method of sluicing out the mains be-

(Testimony of J. H. Cox.)

tween the holder and the producers, which could be done during a burn-out or at the time we were making no gas and the engine running from the holder—being supplied from the holder.

When I left Morenci there might have been some deposit in the first pipe between the producer and the holder which could have been removed by sluicing as I said.

No, I had not cleaned the gas so that it would not deposit in the pipes; it couldn't be done.

Q. With the apparatus you had there, it couldn't be done?

A. To clean it absolutely so there would be no deposit in the pipe?

Q. Had you specified any sluicing apparatus to put in those pipes or in the holder as part of your original installation? A. In my original specifications?

Q. Your original installation? [240—103]

Mr. SEABURY.—We object to it on the ground that it is incompetent, irrelevant and immaterial. There is no provision here that plaintiff shall supply pipe-lines or shall designate how the pipe-lines shall be constructed. It is entirely outside the contract and we have nothing to do with it whatever.

Mr. ROSS.—I believe counsel misapprehends the point I am getting at. I am simply trying to get from this witness whether he cleaned this gas sufficiently to prevent deposit in the pipes.

My plan was to put the gas in the holder and after I got it in the holder, if there was any suspended matter left, the holder would allow the gas to become

(Testimony of J. H. Cox.)

at rest—practically at rest. The velocity would be very small as it expanded in the holder. If I had owned that holder I would have been willing to turn that gas myself into that holder as it was then being produced and use the holder as a cleaner.

I have in other plants that had really more soot than there was in that one used a holder to take the soot out of the gas. My position was that I had made the proper kind of gas when I left Morenci; that I had made the kind of gas free from suspended matter which I was required to make in accordance with the contract when I left Morenci. I was then merely offering to do something more than the contract required me to do.

Q. Did you ever complain to Mr. Thompson that if you had this 15,000 foot holder you would have been able to make better gas—did you tell Mr. Thompson that in your conversation with him?

A. I don't recall using those particular words. I did tell Mr. Thompson, Mr. Le Grand and Mr. McDougall that I could make better gas by using the 15,000 foot holder than by using the 5,000 foot holder. That I could operate the entire plant with a 15,000 foot holder. In accordance with the contract I couldn't make a perfectly complete and effective test for all purposes of one unit with the 5,000 foot holder. I mean by [241—104] "in accordance with the contract," that the contract stated explicitly that the plant must be working within 90% of its normal capacity of 90 horse-power and if only one unit was running it would only be about 33 $\frac{1}{3}$ %. I did reach

(Testimony of J. H. Cox.)

a point where I was ready to turn on three units and work them for the test of what our plant would do. I did turn the three units into the pipe-line for a short time. I stopped on orders to do so by Mr. McDougall. He gave me his reason. He stated there was too much suspended matter in the gas. There was a difference of opinion between him and I. I told Mr. McDougall that by a system of sluicing—I have a distinct remembrance of telling him that I did think that that gas was sufficiently clean to go into the pipe-line. I told him so and I believe it to-day. I made gas but I couldn't state the quantity of gas. One unit at a time, I made the gas clean enough without using the 15,000 foot holder.

A plant of this size should have a good large holder. As to just what it requires, that would be merely a matter of opinion.

Q. Well, I am asking for your opinion.

Mr. SEABURY.—We object to it, if your Honor please, upon the ground that the requirements of this case are fixed and determined by the contract.

Mr. ROSS.—The contract doesn't say that you shall have a holder for making certain tests. The contract says we shall furnish a 15,000 foot holder. Just as you say you furnish a concentrator or piping or producer. It is plain that there was a 15,000 foot holder there. Of course, counsel assumes that that was to be furnished for testing purposes.

The COURT.—I shall overrule the objection.

Mr. SEABURY.—We except.

The COURT.—Answer the question.

A. I don't believe I could state whether it would

(Testimony of J. H. Cox.)

actually require it or would not. [242—105]

Q. This plant, the three units, in regular operation, would make approximately 36,000 cubic feet of gas per hour, if it worked up to its full requirements. It would depend, of course, on the value of the gas. If the value is all right it would. That would fill a 15,000 foot holder more than about twice every hour of operation. One of the functions of a holder is for storage purposes. There must be a holder of sufficient capacity to carry the plant at the time of burn-outs on the producer.

This holder then would approximately carry for a half hour.

Q. Do you regard that as of sufficient storage capacity if you were getting a holder for storage purposes?

Mr. SEABURY.—We object to it as immaterial.

Mr. ROSS.—It goes to the whole point. The contention of plaintiff here is that we have in some way hurt them by failing to let them experiment with a 15,000 foot holder over there.

The COURT.—The objection is overruled.

Mr. SEABURY.—Exception.

A. It would depend entirely upon what this storage—for what purpose this storage was—the storage necessary in this case, I would consider would be to carry over any, any period which it might be necessary to shut off one or two or all three of the units. It is a reserve and I wouldn't consider it a storage capacity. It is a reserve capacity. Its purposes are principally other than storage. I do not know the

(Testimony of J. H. Cox.)

approximate weight of that 15,000 foot holder. I do not know the approximate weight of a 5,000 foot holder.

Q. Are you familiar with the provision of the contract which says: "That in addition to the producers and auxiliaries which would ordinarily be installed inside the power plant, space will be required outside the building for a small gas holder. The weights of these holders will range from 3,500 lbs. for 100 horse-power to 13,500 lbs. for 400 horse-power." Are you familiar [243—106] with that statement in the bulletin?

Mr. SEABURY.—We object to it as improper re-cross-examination and on the further ground that the typewritten part of the contract will be the controlling feature in the contract and that that particular part of the contract specified exactly what holder shall be provided and in what way tests shall be made.

Mr. ROSS.—I presume that specifications in the plant will be looked to as determining what the intent of the parties was.

Mr. SEABURY.—We get back to the same proposition that if we are to look to that we are also to look to the contract itself. If we look to the contract itself, we see it is a 15,000 foot holder and the tests are to be made out of the holder. Go back to the bulletin, we have the same proposition whether or not the contract itself or the bulletin will be the prevailing feature in determining the intention of the parties.

The COURT.—I overrule the objection.

(Testimony of J. H. Cox.)

Mr. SEABURY.—We except.

A. I know that that statement is in the bulletin. I do not know the weight of a 15,000 foot holder, or of a 5,000 foot holder.

Q. When you specified a 15,000 foot holder, what particularly made you pick out a 15,000 foot holder?

Mr. SEABURY.—We object to it as inadmissible, incompetent and not proper recross-examination.

Mr. ROSS.—It may not be proper recross-examination.

The COURT.—I think you were allowed to ask similar questions on direct examination.

Mr. SEABURY.—I intended to ask only one question on my redirect examination and that was as to value. [244—107]

The COURT.—I didn't know that you confined it to that one question.

Mr. SEABURY.—I'll withdraw it as to not proper recross-examination, but urge the objections made in addition thereto.

The COURT.—The objection is overruled.

Mr. SEABURY.—We except.

A. Mr. McDougall told me that he would furnish a 15,000 foot holder. That was the reason that that size was mentioned. When I saw Mr. Thompson on May 6th I said that I wanted an extension of time in which to install a rotary washer which could be shipped from Buffalo in seven or eight weeks and would require about 30 days in transit from the factory to Morenci.

In my examination this morning I said that the gas

(Testimony of J. H. Cox.)

went into this 5,000 foot holder by a pipe which was the only inlet or outlet of that holder that could be opened; there was an old outlet, but the gate valve had become so rusted that we were unable to open it. That gate valve was located right near the holder, between the holder and the producer, on a return pipe that was so rusty I couldn't get it opened. There was a pipe-man—I don't recall his name—working around the gas plant. He attempted to open it, but he couldn't. I then assumed that it was impossible to get that open. After I opened it, I was going to burn the gas at that point instead of letting it come back to the header. There was another point at the ruff of that holder, at the top of the holder at which I could burn gas, but I wouldn't dare to try that. No, I might have caused an explosion.

The Smith-Booth-Usher Company furnished the plans of this plant at the outset. I don't recall just whether the absolute connection from our gas-header to their main is definitely shown on the plans, the water-pipe and air-pipe and all, I am satisfied was shown. As far as any connection [245—108] with the gas-holder was concerned, our specifications showed none. I did not put in the connection with the 5,000 foot holder; I did not superintend the connection, the making of that connection. That was done by the pipemen of the company. After I arrived there, it was made at the suggestion of Mr. Le Grand that we connect up that holder. That was after I asked him for a holder. I do not think Mr. Le Grand ever asked me if a 5,000 foot holder would

(Testimony of J. H. Cox.)

do. He said that I might connect up to this old holder which wasn't in use. I needed to demonstrate our plant. I don't recall that I told him the kind of connection. I probably suggested a connection from the header to this small holder, for the purpose of measuring the quantity from one unit. I think I explained to Mr. Le Grand at that time that it couldn't be used for all three. I don't know that I had any alternative. I accepted the holder, the small holder, for the matter of measuring the quantity from one unit. I don't recall making any objection to the size of the pipe. I objected to concerning that connection that the holder would merely be floated on the line and it was hard to secure an even pressure, for the reason that it was necessary to keep a gate valve open at the end of the header, and if a large quantity of gas was made there was a different pressure than if a small quantity was made and that I was unable to obtain an even pressure on the plant. All that had reference to the fact that there was no outlet for the holder and the holder merely filled with gas and rose to its height and after that the gas escaped from the producers directly through this gate valve and didn't go to the holder and return. I was then getting at the quantity of gas produced by one unit and also to regulate the producers approximately for the quantity that I desired to make. In other words, to get them working under normal [246—109] conditions. I connected up the small holder with the pass valve to regulate the gas-producer, fixing the holder so that when it reaches a certain point,

(Testimony of Samuel J. Smith.)

it operates a lever or some device which then controls the producer plant itself and the amount of gas it will manufacture.

Mr. ROSS.—That is all.

[Testimony of Samuel J. Smith, for Plaintiff.]

SAMUEL J. SMITH, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. SEABURY.)

My full name is Samuel Smith. I am president of the plaintiff company and was its president in December, 1912, and have been continuously thereafter. I am familiar with the contract known as Plaintiff's Exhibit 1 in this case. I know the character of the plant that my company contracted to install and furnish to the defendant in this case. I have been familiar with apparatus of that kind about six years between five and six years. During that time we have not frequently furnished, sold apparatus of that kind, plants of that kind. We have sold,—I believe I had personally to do with about four outfits. About four of them. Yes, I think that's it. I am by reason of my business familiar with the value of those plants when installed.

Mr. SEABURY.—For the purpose of the record, your Honor, I desire to ask the witness whether, and do ask the witness whether he knows the reasonable value of the plant installed by the plaintiff for defendant at the defendant's place of business and to

(Testimony of Samuel J. Smith.)

ask him to state what that value is, if he knows.
[247—110]

Mr. ELLINWOOD.—To which we object on the ground formerly stated.

The COURT.—Objection sustained.

Mr. SEABURY.—Exception. There is no objection to the fact that the question is not in detail.

Mr. ELLINWOOD.—No. Our objection only goes to the admission of any evidence in support of the second count of the complaint.

The COURT.—That was the theory upon which I sustained the objection.

Mr. SEABURY.—To which I respectfully except. I remember Mr. Smith receiving Mr. Thompson's letter of May 28th, Plaintiff's Exhibit "C," a short time prior to that time I received a telegram from Mr. Thompson or from the Detroit Copper Company. I received a telegram or its confirmation, dated May 27th, 1913, addressed to the Smith-Booth-Usher Company and signed by A. T. Thompson of the Detroit Copper Company at or about that date. This is not the original telegram.

Mr. ELLINWOOD.—We admit it is a correct copy.

A. It is the confirmation mailed in a letter.

Mr. SEABURY.—I offer it.

The COURT.—It may be received.

Marked Plaintiff's Exhibit "D."

Exhibit read to jury.

About one week after the receipt of that telegram and of Plaintiff's Exhibit "C" I had a talk with Mr.

(Testimony of Samuel J. Smith.)

Thompson in Los Angeles, about one week afterwards, approximately. The conversation took place in our office. Mr. Cox and Mr. Usher and myself were present with Mr. Thompson. Mr. Cox brought Mr. Thompson to the office, as I recollect it and introduced Mr. Usher and myself, as it was our first meeting with [248—111] Mr. Thompson. We sat down by Mr. Usher's desk and talked for some little time on generalities aside from any business dealing and then after a time I said to Mr. Thompson, "We waited very patiently for more than two weeks to hear from you and we didn't hear from you and then I wrote you a letter and we was very much surprised to receive your telegram saying that you would go no further with the plant." "Well," he said—I can't be quite sure on that, I think his answer to that was that he had been delayed in getting his report and he made some excuse for not taking it up sooner and I think that was it, but I can't be positive. Then I said to him, "Mr. Thompson, we have waited patiently to hear from you and when we finally get your letter you say you don't question we could wash the gas clean and that we could make good gas and yet you say that you won't go on with your contract." "Well," he says, "that's just about it." "Well," I said, "Mr. Thompson, then you burn your bridges behind you and tell us about it afterwards. In other words, you gave us no consideration in arriving at your conclusions. "Well," he says, "we need the power and we have made other arrangements and there isn't anything further we

(Testimony of Samuel J. Smith.)

can do with it.” That was about the substance of our conversation as it applied to the business. We had some further talk on generalities and Mr. Thompson left.

We were prepared at that time to go on with the trial of the apparatus and perform the contract. We were waiting to go on with it. I remember when Mr. Cox was employed by the plaintiff company. I employed him. I wouldn't say that I especially outlined what his duties would be at the time of employment, but his authority has been at all times just the same as with all our salesmen and employees filling that kind of a position. They have [249—112] full authority for ordinary correspondence and detail, but have no authority, authority by the board of directors or—in fact under our by-laws, without authority from the board of directors to make any agreement binding the company, without the approval of the president or the treasurer.

Q. In what capacity, if any, did Mr. Cox work for your company in connection with the installation of this plant?

A. There was no special engagement for that work. He had been in our employ and it was agreed when he bought an interest in another business and left our employ that when we were ready to make the tests he would make the test for us and continued his work for us on the same basis as before he severed his connection with us. He severed all connection with our company February 1, 1913, I think.

Q. Now, what I am trying to get at is, Mr. Smith,

(Testimony of Samuel J. Smith.)

what was the character of his employment and work done for the plaintiff company in connection with the installation of this plant as distinguished from its sale or from the making of the contract?

Mr. ELLINWOOD.—May it please the Court, I object to this questioning the transaction of Mr. Cox. I think that they are estopped from questioning the authority of Mr. Cox in this matter.

Mr. SEABURY.—We are not claiming Mr. Cox didn't have authority to do what he did. We are confronted with a mass of correspondence, identified but not offered in evidence, and it seems to me it is only proper that we should offer evidence at this time, exactly what the limits of authority was.

The COURT.—The exhibits have not yet been introduced. What relevancy could this have at this particular time?

Mr. SEABURY.—There has certainly been an examination [250—113] of Mr. Cox as to what he did. It is part of our case to show what—how he did do what was done.

Mr. ELLINWOOD.—Here's a lot of letters marked for identification which will be later put in evidence and they are by the Smith-Booth-Usher Company. They are written out of Los Angeles, out of the general office, the name of Smith-Booth-Usher is signed to those letters and Cox's signature is appended. Then he goes to Morenci and makes a proposition in his letter of May 6th. Then Mr. Smith on the same letter-head, same typewriter,

(Testimony of Samuel J. Smith.)

writes to the Detroit Copper Company referring to Mr. Cox's proposition. It seems to me he is estopped. They want to say he is a mere workman or laborer around the office.

Mr. SEABURY.—We simply asked this witness what the authority of Mr. Cox was.

Mr. ROSS.—We think the authority is wholly irrelevant and immaterial and we object to it.

The COURT.—I sustain the objection at this time. It is not material.

Mr. SEABURY.—We except.

Cross-examination.

(By Mr. ROSS.)

That is my signature to this letter dated February 21st, 1913, addressed to the Detroit Copper Company and signed Smith-Booth-Usher Company by S. J. Smith, president.

Mr. ELLINWOOD.—Let that be marked for identification.

Defendant's Exhibit 12 for identification.

That is my signature to this letter from the same party to the same party, dated February 28th, 1913.

Mr. ELLINWOOD.—I ask that that be marked for identification. [251—114]

Defendant's Exhibit 13 for identification.

That is my signature to the letter from the Smith-Booth-Usher Company to the Detroit Copper Company, dated February 24th, 1913.

Marked Defendant's Exhibit 14 for identification.

The signature to the letter from the Smith-Booth-

(Testimony of Samuel J. Smith.)

Usher Company to the Detroit Copper Company dated May 20th, 1913, is that of Miss L. M. Shockley, the cashier in the office. That was sent out by the Smith-Booth-Usher Company to the Detroit Copper Company. I assume it was. I didn't see it go. It is our letter-head. It is to be presumed it was.

Marked Defendant's Exhibit 15 for identification.

I see the letter marked for identification, Defendant's Exhibit 7. That is my signature to that letter. I see what purports to be copy of letter to my company from A. T. Thompson, general manager, dated November 25th, 1912, the original whereof is stated to be out of the jurisdiction of the court, and which came to me in the due course of mail. I recollect receiving such a letter in advance of the making of this contract.

Marked Defendant's Exhibit 16 for identification.

My acquaintance with the Amet-Ensign gas-producer plant extends over a period of five or six years. I have personally been concerned with the sale of about four plants. I am not a graduate engineer. My experience in the manufacture of these plants is wholly practical and has been my life work in that class of work. I was not at Morenci during the period of installation of this particular plant, so my knowledge of what took place there would wholly be as reported to me by others. [252—115]

My conversation with Mr. Thompson was early in June, as near as I can recall, about the 6th. I can't fix the exact date. The period of 90 days from the installation of this plant at Morenci has not been

(Testimony of Samuel J. Smith.)

expired. It had thirty days yet to run—about that, I think. I don't know the exact date. I then stated to Mr. Thompson that we had been holding a man to send up until we received his notice. I didn't tell him further than that. We had not been holding this man to send up in the event that a rotary washer should be installed. Not necessarily a rotary washer. It was up to us to fulfill our agreement in every respect and if we had not done so, which of course I was in no position to judge only from hearsay testimony, we are ready to go on and perform it if it could be done and we believed we could.

Q. Now, so that you get my question clearly, did you then or at any time say to Mr. Thompson, we would like to go back to Morenci and see what more we can do with the plant as we have already installed it?

A. Why, no, for the reason that Mr. Thompson stated they had made other arrangements and no longer had use for it. I did not offer to see if we could make it satisfactory by continuing with that particular installation. I don't think I made such an offer literally. The fact is, is it not, Mr. Smith, that you didn't contemplate making any further trial of that installation there without introducing some additional apparatus. Not necessarily additional apparatus. In order to satisfy them fully as to the cleanness of the gas, we should have had to have made changes, perhaps, or an introduction of other apparatus. I couldn't say, because we didn't

(Testimony of Samuel J. Smith.)

continue it. I don't know. It was the direct result that we were waiting with the understanding that they would investigate [253—116] this new type washing apparatus. I don't understand that there has been any question of the quality of the gas. The cleanness of the gas is the objection I understand that was made. I don't recollect making a statement to Mr. Thompson that we could make that gas clean enough with the apparatus we had already put in over there. Nothing else was done in connection with the test until the point was settled whether our man should go back there at the proper time and install this scrubbing or washing apparatus at Morenci which was being used at El Centro. An extension of time in which to install this additional apparatus was a part of Mr. Cox's request. I don't claim that Mr. Thompson ever agreed that we might install it. We merely requested that extension of time and he refused to grant it.

Ninety days' time for the equipment to be received at Morenci was the extreme. I attended to that correspondence, wiring to the eastern factory myself, and as I recall, the reply was they were reasonably sure of making shipment in six weeks and an extreme of eight weeks and unless unforeseen delay in transit occurred, it should come through in about two weeks. From eight to ten weeks would be the time then from the shipment of the machine until it would arrive at Morenci, from eight to ten

(Testimony of Samuel J. Smith.)

weeks from the time of the order, from the time of the order I mean to the time it arrived at Morenci.

When this plant was purchased, our manufacturer's bulletin specified a vertical scrubber, and when we made the installation we installed a combination of horizontal and vertical scrubber. Instead of the vertical being next to the producer as it is on the older types, there is a horizontal washer connecting from the producers with the vertical section on the upper end of it which [254—117] they frequently term as a scrubber. The vertical section which we installed at Morenci had the same character of vertical scrubber which appears in the manufacturer's bulletin but was not quite as large.

Mr. ELLINWOOD.—That's all.

Mr. WRIGHT.—I would like to read at this time the deposition of O. H. Ensign.

The COURT.—Very well.

[Deposition of Orville H. Ensign.]

Deposition of ORVILLE H. ENSIGN read as follows:

Direct Examination.

(By Mr. WRIGHT.)

My full name is Orville Hiram Ensign. My occupation is electrical mechanical engineer. My position at the present time is chief electrical mechanical engineer for the United States Reclamation Service. I have been in that capacity ten years—that is my present position, ten years. I have been with the United States Government all that time.

(Deposition of Orville H. Ensign.)

I am familiar with a gas-producing plant erected by Smith-Booth-Usher Company at Morenci, Arizona, for Detroit Copper Mining Company, as much as I could become familiar with it at the time of my visit there. I can't fix the date of going to Morenci. As nearly as I can recollect it was some time in the early part of the summer months—but whether it was June or July I couldn't tell at the present time. The purpose of my visit to Morenci at that time was to see the producer in operation and the results from such operation as far as they could be obtained from a short visit. I was there parts of three days during that time I was at Morenci and examined the gas which was produced by the gas-producer in question, such an examination as could be observed without any chemical analysis or other [255—118] tests of that sort, simply the observation of the plant by the naked eye. I examined the gas to such an extent that I could tell whether or not there was any suspended matter contained in it. The suspended matter was light lampblack of a feathery nature.

The gas which I examined was taken from a manifold connecting three producers together. It was taken immediately after the gas left the producer. There was no holder through which the gas passed prior to the point from which it was taken while I was there. The holder was connected simply as a cushion against which gas could be made, but no outlet was taken beyond that holder that I remember. This was a small holder. I couldn't tell what size it was. I wasn't at all interested in the size of the

(Deposition of Orville H. Ensign.)

holder. I do not think I could even approximate it.

I have been familiar with gas-producers of the type which was erected at Morenci ever since the first one was made. I have seen five of them in operation, five different installations.

Q. Was the gas produced by any of the five holders of which you speak cleaner or did it contain less suspended matter than the gas produced at Morenci?

Objection to on the ground that the question is immaterial in that it makes no difference what other gas machines may have been or in what manner at all they performed their functions.

Mr. WRIGHT.—I would like to make a statement of that question before the ruling is made, your Honor. I merely want to make an offer of proof before the ruling is made. The plaintiff in this connection offers to prove that other machines of the same type as that which was erected [256—119] at Morenci, operating under the same conditions, produced gas which did not contain suspended matter injurious to the pipes or to the engines which was the same quality and kind as those owned by the defendant at Morenci and through which this gas was to be passed.

The COURT.—I guess you had better ask the questions and I will rule on them. I think that would be better than offering the proof.

Mr. ELLINWOOD.—I conceived that if the witness were on the stand that counsel might ask to prove by the witness certain things, but inasmuch as

(Deposition of Orville H. Ensign.)

this is in a deposition, this will be governed by the answer in the deposition and perfectly preserved.

Mr. WRIGHT.—That's all right. I withdraw the offer.

Court reads answer.

The COURT.—I sustain the objection.

Mr. SEABURY.—We except.

Mr. ELLINWOOD.—Then that will govern the subsequent question, line 21 I have it.

Mr. WRIGHT.—Would it not be better to ask the question?

The COURT.—Yes, so the reporter can get it.

Mr. ELLINWOOD.—I understand this deposition is of record.

Q. Were any of the other gas-producers producing cleaner gas than the one at Morenci besides the one at El Centro?

Mr. ELLINWOOD.—I object to that.

The COURT.—The objection is sustained.

Mr. WRIGHT.—If the Court please there was no objection made at the time.

The COURT.—Is this taken on open commission?

Mr. ELLINWOOD.—Yes, open commission.

[257—120]

The COURT.—Just pass on and I'll rule on it.

Mr. WRIGHT.—All this tends to the same effect.

The COURT.—It seems to me we have a statute on the subject, even where no objection is made.

Mr. ELLINWOOD.—It was taken under the federal statute, 863 I think it is.

The COURT.—Yes, but I imagine we follow the

(Deposition of Orville H. Ensign.)

state practice. (Reads section 2525 of the Arizona Statutes.) The objection is sustained.

Mr. SEABURY.—We except.

Q. How long has these other five producers been in operation?

Mr. ELLINWOOD.—Same objection.

The COURT.—Same ruling.

Mr. SEABURY.—Exception.

Q. Have you observed the condition of the gas-carrying pipes and the condition of the engines at El Centro, at Yuma and at the Pan-American Ostrich Farm?

Question objected to on the ground that it is immaterial and irrelevant in this, that it tends to elicit testimony concerning other gas engines at different places and has no tendency to prove any of the issues in this case.

The COURT.—Same ruling.

Mr. SEABURY.—Exception.

Mr. WRIGHT.—Now, I understood, your Honor, that my offer of proof did not become a part of the record upon the ground that it was not made at the time of the deposition.

Mr. ELLINWOOD.—It is already here. This deposition is in the case.

The COURT.—Your offer to prove any fact or facts, by answers contained in the deposition, was not protected, [258—121] because I held that you should read the questions and objections and if you have any other witnesses you desire to produce, you may then make that offer.

(Deposition of Orville H. Ensign.)

Q. What engines have you seen in operation other than these engines?

Mr. ELLINWOOD.—We make the same objection.

The COURT.—Same ruling.

Mr. SEABURY.—Exception.

Mr. WRIGHT.—The answer to that question contains some reference to his qualifications and bears upon the next question and the next question makes no sense without the part of the answer.

Mr. ELLINWOOD.—I withdraw the objection for the benefit of counsel to that question.

A. Gas engines?

A. From a general experience in connection with developing power for over twenty-five years or more.

Q. Where have you been engaged in that experience?

A. In Los Angeles and in observation in all sorts of places.

A. What is the effect of the suspended matter contained in the gas produced by the other installations than the one at Morenci upon the pipes as to clogging them or stopping them up?

Mr. ROSS.—Objection. We further object generally to this line of testimony regarding the condition of other gas plants at other places, for the reason it tends to prove no issues in this case, nor is it shown that such plants were installed or operated in the manner in which the plant in question was installed and attempted to be operated. And this objection is made generally to this line of testimony

(Deposition of Orville H. Ensign.)

for the sake of brevity.

The COURT.—In view of the testimony in this case and the [259—122] *the* law on the subject, I think that objection is a good one and I sustain it.

Mr. SEABURY.—Exception.

Q. Were the plants which you have described at other places the same type of producer as that in operation at Morenci?

Mr. ELLINWOOD.—Same objection.

The COURT.—Same ruling.

Mr. SEABURY.—We except.

Q. Were these other plants of which you speak operated under the same conditions as the one at Morenci?

Mr. ELLINWOOD.—Same objection.

Mr. SEABURY.—These questions now are tending to qualify the witness to give the testimony which has been excluded and which we think with other testimony which has been excluded in the case would have been competent. In other words, I think in order to make evidence relating to other plants admissible in this case, we have got to show that the other plants were similar, that the conditions were the same and that the general surroundings are practically identical. We have endeavored to show that by other witnesses and now come questions addressed to this very witness in the deposition asking him whether these things are the same or not. For the purpose of qualification, it seems to me those questions are clearly admissible.

Mr. ELLINWOOD.—May it please the court, the

(Deposition of Orville H. Ensign.)

answer does not show any similarity at all as a matter of fact. Now, as I understand it, there is all the difference in the world in the same plant. The plant producing gas which is consumed by engines within 30 or 40 feet of the generator where they take the gas immediately from the machine and use it in their engines is quite a different proposition from a generator installed and in which the gas is [260—123] conveyed a thousand feet to the engines, etc. There isn't any pretense that these other installations were the same as the one in Morenci, the situation of the engines and the length of the pipes, all these things.

Mr. WRIGHT.—It is not our purpose to show a similar plant producing similar gas, but simply that Mr. Ensign had observed similar plants and was qualified to testify as an expert as to the plant at Morenci.

The COURT.—You mean he is qualified to testify as he has testified?

Mr. WRIGHT.—No, as he will testify. That is the reason I turned the deposition over to your Honor. Because that shows what he will testify to along those lines.

Mr. ELLINWOOD.—If that is the purpose counsel may ask the question and I'll agree to keep still.

A. So far as I can see from the gas-making standpoint, I mean by that, so far as manufacture of gas and delivering it to a system of pipes except in all these other plants a holder was used in proportion somewhat to the capacity from my experience, in my observation of other plants of this type which I have

(Deposition of Orville H. Ensign.)

seen, it is my opinion that if the samples of gas which I had occasion to notice had been taken after leaving a holder of fifteen thousand cubic feet capacity, there would have been a certain amount of deduction in the suspended matter. It would be very difficult to give in positive terms, or quantities how much of that suspended matter would have been removed. It would be very hazardous to risk any statement. It would be in a very considerable degree, however. I am not familiar with the amount of labor necessary to operate the plant—gas-producing plant of the Detroit Copper Mining Company which was in operation prior to the time of the installation of [261—124] the Smith-Booth-Usher Company plant.

Mr. WRIGHT.—That is all.

Cross-examination.

(By Mr. ELLINWOOD.)

The plant at Morenci consisted of a gas generator, which was a special form of combustion chamber, attached to a seal type washer, connected directly to a seal type washer and certain oil pumping devices. The washer of which you speak is sometimes called a scrubber. The terms are used synonymously one way or the other as the party using them takes a notion. The scrubber that was installed there was the type used in the city of Los Angeles and used on the large gas plants—illuminating gas produced from oil. That is not called a vertical scrubber. It is a horizontal scrubber. I have read the contract between the parties, but do not remember all the

(Deposition of Orville H. Ensign.)

details. I don't remember that the contract provided for a vertical scrubber, or such other improvements as the parties may install, what was installed was a horizontal scrubber. That was the main scrubber. There was, however, a vertical washer at the end of it. It was constructed as follows: There was a tank, a rectangular tank, perhaps an average of three feet in depth, if I remember, about twenty-two inches wide and a diaphragm extending about nine inches from the top, nearly the whole length of it and to which were attached baffles. There were some riveted iron baffles. The idea is not that the gas goes through the water and over the baffles. Oil gas development, as shown here, with illuminating gas indicated that the confined narrow crack between the water and the seal diaphragm holding the gas in close contact with the water has been [262—125] most effective, and it is practically the only type used.

I don't know when it was that I was in Morenci, I didn't anticipate that date coming up. I think I have a diary here, but I can't be sure of it. I travel so much. It is pretty hard to remember. I think it was the last of May or the first of April.

I don't know that I represented anybody, but went there because I am interested in the producer. I went there at the request or suggestion of the Smith-Booth-Usher Company, to do what I could toward advising on whatever problem had risen. Mr. Cox was present at that time. I met Mr. Le Grand at that time, the engineer for the company. I recall a

(Deposition of Orville H. Ensign.)

conversation there one evening, had with Mr. Le Grand at that time on the veranda of the Morenci Hotel, at which time Mr. Cox was present. Whether I can recall all that was said or not I do not know. I don't remember that I said to Mr. Le Grand in the presence of Mr. Cox as follows: At the time of the sale we had no satisfactory scrubbers and have been furnishing our generators—consulted engineers of wide experience in gas scrubbers who recommended the one furnished. I doubt if I said we had no satisfactory scrubbers, but if I remember the conversation at all, it was that we were endeavoring to do everything we could to get the best for this plant that the present practice on oil gas would indicate. Just exactly my words, I cannot remember.

I know what a centrifugal or rotary scrubber is. That is the type used at El Centro. We did not furnish a centrifugal or rotary scrubber at the time we put in this plant because I knew of no such one operating successfully on oil gas and was advised against it by the two best oil gas men I could find in Los Angeles. The company at that time had never tried it out. Had one purchased but [263—126] had not been shipped or installed. I knew it was not in operation.

Q. At that time and place did you state that you had gone as far as you could with the gas plant—with the appliances then at hand?

A. So far as I could in producing results that you people desired.

Q. And could not make any satisfactory gas?

(Deposition of Orville H. Ensign.)

A. I cannot be positive as to the actual words I may have used in that conversation. I do not believe that I said anything which could have been construed to the exact meaning of your question, but do remember distinctly stating, as I have before in my testimony, how well this make of gas would operate in engines where the gas is much dirtier than the gas at Morenci.

I was not in any position to ask any time on the contract to put in a centrifugal scrubber. I might have recommended and believe I did recommend the centrifugal scrubber and that either Mr. Le Grand or Mr. Douglas visit the El Centro plant and see what it was doing there and I believe he did visit afterwards at our request.

It has been common practice with oil—all oil gas manufacture that I have come in contact with and I have been responsible for the operation of a number of them, to have what is known as a relief holder between the gas-generating apparatus and the main holder or the gas-mains, and the function of that is to allow a settlement or cooling or condensing of light *fluculent* material which is produced from oil gas that down to the time of the Morenci contract had never been completely cared for without that precaution to protect gas-mains. There is no difference between what is commonly known as a gas-holder and what we term a relief, except that where a company is distributing large quantities of gas, like distributing through city mains, it usually passes through two holders. I would turn all of the

(Deposition of Orville H. Ensign.)

gas into that relief holder. I believe [264—127] that has been done. The holder would not have the function as a sort of settling tank in the extent that you could speak of it in terms of definite quantities, for the material taken will produce a very extensive discoloration of the gas—for instance, at the Yuma plant, above mentioned, four years' run did not produce three inches of lampblack in the bottom of the holder. The gas coming from the producer in the Yuma plant carried more lampblack before it reached this holder than this Morenci plant. The main function of a gas-holder is to take up the variation and demand upon the plant.

We would not in the sense say we took a sample of gas—we observed the gas after it passed the scrubber, not after it passed the holder. One unit of this plant was working at this time. There were three there installed. Every unit had its own scrubber or washer. In actual operation there was one unit while I was there. The capacity of gas-holder which I would recommend for one unit of a gas plant such as was installed at Morenci would depend upon the demands upon the holder and the other conditions surrounding the plant. I am not sufficiently familiar at the present time with all of the conditions at Morenci to say as to one unit such as was installed there at Morenci. I could not determine the size of the holder to fit the demands of the plant as the Morenci people might wish to handle the gas, without knowing all their conditions. If gas containing suspended matter is turned into the scrubbers and

(Deposition of Orville H. Ensign.)

then into the holder and doesn't settle in the holder, what becomes of this suspended matter that the gas carries depends on the general arrangement of the lay-out of the system. The plants that I have referred to, seventy-five or ninety per cent [265—128] of it went through to the engine, consumed as fuel and added to the economics of the plant, with perfect satisfaction, some of it was condensed in the gas-main and was washed out by means of sluicing mains with sumps in the gas line. This soot and lampblack would either be consumed as fuel or it would be required to be flushed out, but as to offering any serious obstruction, it can be done without shutting down, and has been done in other plants on days of continuous running. I was financially interested in this gas-producing plant in a measure, to the extent that I am practically the designer of the process and the one who is responsible for directing its development and to the extent of a small holding of stock in the company.

Redirect Examination.

(By Mr. WRIGHT.)

I remember a conversation with Mr. Le Grand or with Mr. Douglas, at which the quality of the gas produced at Morenci by the producer in question was discussed. Mr. Cox and myself, Mr. Douglas and Mr. Le Grand were present at that time. Mr. Douglas or Mr. Le Grand, I do not remember which one made the remark, but either stated that the analysis of the gas produced by the producer in question was of such a kind that it made an ideal gas

engine fuel. This conversation took place on the balcony of the hotel at Morenci, after supper, if I remember right, in the evening.

Mr. WRIGHT.—That is all of the deposition.

The COURT.—Any further testimony?

Mr. WRIGHT.—Plaintiff rests. [266—129]

And the foregoing was all the evidence given, introduced, heard and exhibited at the trial of said cause.

BE IT REMEMBERED that during the trial of this cause the further proceedings were had:

[Motion of Defendant for Instructed Verdict.]

The defendant moved the Court as follows:

“Comes now the defendant above named and moves the Court to instruct the jury herein to return a verdict in favor of defendant, and for grounds of such motion respectfully represents and shows to the Court:

I.

That in plaintiff's amended complaint herein it is alleged that plaintiff has duly performed each and all of the stipulations and conditions on its part to be performed, under the contract set out in the first cause of action in said amended complaint, which said allegation is denied in and by defendant's amended answer, and that the evidence introduced on behalf of plaintiff herein is insufficient to prove the facts constituting plaintiff's said alleged performance.

II.

That the evidence offered by plaintiff is insuffi-

cient and wholly fails to show that the machinery furnished by the plaintiff to the defendant properly performed the duties for which it was known to be intended by the parties to this action.

That the evidence offered by plaintiff is insufficient and wholly fails to show that said machinery, when working within 90% of its normal rated capacity and using California asphaltum base crude oil, ranging 14° to 18° Baume reduced to 60° Fahrenheit, containing not less than 18,500 British Thermal Units per pound, weighing approximately seven and eight-tenths (7-8/10ths) pounds per gallon would deliver at least 190 British Thermal Units, low value, for each gallon of said oil fired.

IV.

That the evidence offered by plaintiff is insufficient and wholly fails to establish that said machinery in operation would produce, from one gallon of said oil, 78,500 British Thermal Units in heat value of gas ranging from 190 to 210 British Thermal Units, low value, per cubic foot.

V.

That the evidence offered by plaintiff is insufficient and fails to establish that the gas produced was of uniform quality, within the range of 5 British Thermal Units of determined heat content of said gas under regular operation or that said gas was of similar [267—130] analytic composition to that given in the manufacturer's bulletin, attached to the aforesaid agreement.

VI.

That the evidence offered by plaintiff is insuffi-

cient and wholly fails to establish that said gas contained no suspended matter which would be injurious to the engines or gas-conducting pipes of the defendant or which would cause deposits in said pipes.

(Signed) ELLINWOOD & ROSS,
Attorneys for Defendants.

That the evidence offered by plaintiff is wholly insufficient to support a verdict for plaintiff herein.

ELLINWOOD & ROSS,
Attorneys for Defendant.”

BE IT REMEMBERED that during the trial of this cause the further proceedings were had:

[Instructions of Court to Jury.]

The Court instructed the jury as follows:

“The defendant herein has filed its motion and moved the Court to instruct the jury to return a verdict in its favor upon the grounds set out in the motion. I have carefully considered the testimony introduced in connection with the pleadings herein and it is my opinion that the motion should be granted. I will state briefly my views.

By the terms of the Contract sued upon, plaintiff, the Smith-Booth-Usher Company, was to have furnished to defendant three 200 horse-power International Amet Crude Oil Gas Producers, lined complete with brick work and concrete, with all piping and valves as shown in cut on the first page of plaintiff's bulletin attached to said contract, with scrubbers, oil pump, plans and specifications for installation, shipment to be made by plaintiff at Los Angeles, California, delivery to be made f. o. b. cars,

Morenci, Arizona, in consideration of which, the defendant, The Detroit Copper Company of Arizona, agreed to pay plaintiff the sum of ten thousand dollars, together with interest at the rate of six per cent per annum from date of erection until paid, all payable in the City of Los Angeles, upon the following terms: "On completion of ninety days' trial, should the apparatus meet the guaranties herein specified, or any time prior to the end of the ninety days trial herein specified, should the purchaser so elect."

The burden is upon the plaintiff to prove that upon the said trial of said machinery, it did meet each and all of the guaranties specified in said agreement and that plaintiff has fully performed each and all of the terms of said agreement by it to be performed, and if it has failed so to do, then the defendant is entitled to a verdict in its favor, unless it be found that the plaintiff's failure so to do, * * * was caused by the wrongful act or conduct of the defendant or by failure on the part of the defendant to perform some duty which by the terms of said agreement it owed to the [268—131] plaintiff and which it understood and agreed to perform.

The question is whether or not the plaintiff did meet all the guaranties specified in the agreement. If not, has it been released therefrom by the defendant's wrongful conduct or has the plaintiff shown some adequate excuse for nonperformance?

The evidence introduced on behalf of the plaintiff shows that the machinery in question was shipped from Los Angeles, Cal., and that at defendant's request the witness Voorhees, operating engineer, went

to Morenci, Arizona, for the purpose of installing said machinery in accordance with the plans and specifications furnished by plaintiff; that the gas plant contained three main units which were connected with a main, though not with one another; that when said gas plant was put in operation, it was found that the gas contained suspended matter which settled at the bottom of the holder; that the plant was started approximately the 27th or 28th day of March, 1913; that witness Voorhees, not being a chemist, that not being his business, did not make a test of the gas; that the producers used in connection with the said plant would not clean the lampblack out of the holder; that the washers and scrubbers installed with this plant were not the same as those described in the contract and were the first of the kind that witness had ever put in.

J. H. Cox, whose qualifications as an engineer were admitted, was also examined on behalf of the plaintiff, and among other things stated that he went to Morenci at the instance of the plaintiff and arrived there about April 2d; that at that time the plant was erected according to the plans and specifications, but not in operation and that witness started it up; and at the start the pipe was unsteady and the gas contained an excessive amount of lampblack, causing the pipe-line of the defendant's plant to become clogged and that he made certain changes in the plant during the latter part of April; that some of the changes so made by him were his own method of producing results; that the washers copied from Los Angeles were in one respect unsuccessful; that Mr.

Thompson, general manager for the defendant company, told the witness that there was too much lamp-black, or suspended matter, in the gas, and witness told Thompson that by sluicing or by a system of sprays, the gas could be used; the witness further said that the lampblack or suspended matter might, after a period, without sluicing or spraying, cause the pipes to become clogged; witness and Thompson then discussed the advisability of installing a rotary converter or washer or scrubber at said plant and that one of the defendant's agents be sent to El Centro; that thereupon and on or about the 6th day of May, 1913, witness left Morenci expecting to return to continue the period of test on the plant; that is, that his expectations were that he would install the rotary converter which it was proposed to install and then complete the 90-day test; that no one had promised that the company would install a rotary washer, but that they were merely going to investigate the matter that at that [269—132] time witness did not feel that he could do anything more with the machinery than he had already done to make the gas any cleaner; that he had made the gas as clean as he could with that apparatus; that he did not expect to return to Morenci to make any cleaner gas with that machinery than he had already made; that by a system of sprays or sluicing it could have been made clean enough to go through the holder and pipe-lines. Witness O. H. Ensign, an electrical and mechanical engineer, examined on behalf of the plaintiff, said that the washer or scrubber which was installed at the Morenci plant was the type known

as a horizontal scrubber with a vertical washer at the end of it. Witness further stated in answer to the question whether soot and lampblack would either be consumed as fuel or clog up the pipes and require them to be washed out, answered "it would be required to be flushed out, but as to offering any serious objection it can be done without shutting down and has been done in other plants on days of continuous running." The evidence further shows that after May 2d, Mr. Douglas, one of the defendant's officers or agents, visited the plaintiff in Los Angeles and that in company with the witness Cox, went to see the rotary washers and then to the office of the Amet Company in Los Angeles; that while in Los Angeles he stated to Mr. Smith, president of the plaintiff company, that the defendant did not desire to go any further under the contract and on May 28th, 1913, the defendant company wired plaintiff to the same effect, and followed up said wire with a letter explaining why they did not desire to do so. It thus appears that the plaintiff, while admitting its inability to operate said plant so as to use the gas produced thereby without a sluicing or spraying process, suggested the installation of a rotary washer which according to the evidence would have caused another delay of from eight to ten weeks.

According to the last clause of the agreement, it is provided that "time is expressly of the essence of this agreement," and in view of all the facts and circumstances and of the use to which the plant was to be put, it could hardly be expected that the defendant would be called upon to grant such extension, and

taking into consideration plaintiff's guaranty that "Any machinery which the company may furnish is guaranteed to perform the duty for which it is known to be intended by the parties hereto," it cannot be said that it was the defendant's duty to install a sluicing or spraying plant to clean the pipes of lamp-black or suspended matter in order to prevent its pipes from becoming clogged or to prevent the necessity of closing down its plant and a cessation of mining operations. It might be that the defendant company could operate the machinery and plant and utilize the gas produced thereby, by the installation of a sluicing or spraying process, but when we take into consideration the provisions in the guaranty last above quoted and all of the circumstances and the terms of the written agreement, it would seem that it was never contemplated by either party to the agreement that any such sluicing or spraying process would be required in order to be able to use the machinery mentioned and described in the agreement; it will be remembered that neither of the witnesses of the plaintiff made any analysis of the gas produced by the plant. The witness Ensign being asked whether he examined the gas which was produced by the [270—133] gas producer in question replied "such an examination as could be observed without any chemical analysis or other tests of that sort—simply the observation of the plant by the naked eye," then how could it be said that the plaintiff has established the facts showing that the said apparatus did meet each and all of the guaranties specified in said agreement; especially the warranty

with respect to the quality and quantity of gas produced. Witness Clox was asked by plaintiff's counsel how many horse-power the plant generated, but failed to answer this question and the question was withdrawn. It nowhere appears in the evidence that defendant prevented the plaintiff or its engineer, Cox, from continuing the experiments or efforts to perfect the plant as installed or to put it in a suitable condition to meet the requirements of the guaranties; plaintiff's representative acknowledged that he was unable to make the gas cleaner with that machinery than he had already made it; therefore there was nothing further for him to do there with that particular machinery to remedy the trouble. It was only when the plaintiff asked for an extension of 90 days' time within which to procure and install other machinery, that the defendant declined to proceed further under the contract and which, under all the circumstances, it seems to the Court it has a right to do.

I have carefully examined the evidence in this case, and I find that it fails to show that the plaintiff has established that said apparatus did meet each and all of the guaranties specified in said agreement, and the defendant's motion to instruct the jury to return a verdict in its favor will be granted. Gentlemen of the jury, you are instructed in this case to return a verdict in favor of the defendant. The Clerk will prepare the form of the verdict.

Mr. SEABURY.—We except, your Honor.

The COURT.—Very well; let the record show an exception on the part of the plaintiff.

Mr. SEABURY.—May the record show that counsel have been kind enough to stipulate that we may have 60 days to file a bill of exceptions?

The COURT.—Yes. Plaintiff may have 60 days from the date of the rendition of the verdict in which to prepare and file its bill of exceptions.

Mr. ELLINWOOD.—Defendant consenting.

Mr. ROSS.—May it appear that upon the return of the verdict, defendant moves for judgment upon the verdict that plaintiff take nothing by its complaint and that the defendant have judgment for its costs. [271—134]

The COURT.—That motion is granted and such a judgment will be entered.

Mr. SEABURY.—To which the plaintiff respectfully excepts.

And time was given, as above stated, within which the plaintiff could prepare and file its bill of exceptions to said ruling.

Recital Re Exhibits.

Plaintiff's Exhibits "A" and "B" and Defendant's Exhibit 1, originals of which are to be transmitted in accordance with orders entered herein July 1, 1914, and July 16th, 1914.

The other exhibits in this action, of which the following is a list, will be printed in the record on appeal in accordance with the stipulation of counsel of the parties herein;

Plaintiff's Exhibit "C."

Plaintiff's Exhibit "D."

Defendant's Exhibit "6," marked for identification,

Defendant's Exhibit "7."

BE IT FURTHER REMEMBERED that on the 12th day of March, 1914, and within the time allowed by the Court as above set forth for the filing of this bill of exceptions upon motion of the plaintiff and consent of the defendant, further time, to wit, until the first day of April, 1914, was given the plaintiff by the Court within which to file its bill of exceptions to the rulings of the Court made at the trial of this cause. [272—135]

AND BE IT FURTHER REMEMBERED that on the 25th day of March, 1914, and within the time allowed by the Court as aforesaid for the filing of this bill of exceptions, upon motion of the plaintiff and consent of the defendant, further time, to wit, until the 25th day of April, 1914, was given plaintiff by the Court within which to file its bill of exceptions, to the ruling of the Court made at the trial of this cause.

BE IT FURTHER REMEMBERED that on the 22d day of April, 1914, and within the time allowed by the Court as aforesaid, for the filing of this bill of exceptions, upon motion of the plaintiff and consent of the defendant, further time, to wit, until the 11th day of May, 1914, was given plaintiff by the Court within which to file its bill of exceptions, to the ruling of the Court made at the trial of this cause.

BE IT FURTHER REMEMBERED that on the 7th day of May, 1914, and within the time allowed by the court as aforesaid for the filing of this bill of exceptions, upon motion of the plaintiff and consent of the defendant, further time, to wit, until the 26th

day of May, 1914, was given plaintiff by the Court within which to file its bill of exceptions, to the ruling of the Court made at the trial of this cause.

And now within the time aforesaid so allowed therefor, to wit, on the 25th day of May, 1914, the plaintiff does now present this its bill of exceptions and asks that the same may be examined, approved and allowed by the Court and filed and made and deemed to be and held a part of the record in this cause.

The plaintiff prays that this bill of exceptions may be allowed, settled and signed.

ALFRED WRIGHT,
SLOAN, SEABURY & WESTERVELT,
Attorneys for Plaintiff. [273—136]

[Order Approving, etc., Bill of Exceptions.]

The plaintiff having served its proposed bill of exceptions upon the defendant, and the defendant having served its proposed amendments and corrections thereto upon the plaintiff, and the plaintiff having accepted and allowed said amendments and corrections, and the bill of exceptions being amended and corrected accordingly, is duly filed and served herein, and the counsel for the respective parties having agreed that said bill of exceptions is correct, it is hereby certified that said corrected and amended bill of exceptions is a full, complete and correct abstract of all the testimony introduced by the parties on the hearing of the cause, and constitutes all the substantial testimony therein material to the issue, and it is

ORDERED that said bill of exceptions be and it hereby is approved, settled and allowed this 18th day of July, A. D. 1914 in term.

(Signed) WM. H. SAWTELLE,

Judge. [274]

[Endorsed]: In the United States District Court for the District of Arizona. Smith-Booth-Usher Company, Plaintiff, vs. The Detroit Copper Mining Company of Arizona, Defendant. Draft of Bill of Exceptions. Filed Jul. 18, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [275]

*In the United States District Court for the District
of Arizona.*

No. 97 (Phoenix).

SMITH-BOOTH-USHER COMPANY,

Plaintiff,

vs.

DETROIT COPPER MINING COMPANY OF
ARIZONA,

Defendant.

**Order Under Rule 16, Section 1, Enlarging Time to
August 1, 1914, to File Record Thereof and to
Docket Case.**

On consideration of the application of Mr. George W. Lewis, the clerk of the District Court of the United States for the District of Arizona, and good cause therefor appearing,—

IT IS ORDERED that the time within which the original certified Transcript of the Record in the

above-entitled cause may be filed, and within which the cause may be docketed with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be, and hereby is enlarged to and including the 1st day of August, A. D. 1914.

WM. H. SAWTELLE,
Judge of the United States District Court for the
District of Arizona.

Dated at Tucson, Arizona, this 24th day of July,
A. D. 1914. [276]

[Endorsements]: No. 97 (Phoenix). In the United States District Court for the District of Arizona. Smith-Booth-Usher Company, Plaintiff, vs. Detroit Copper Mining Company of Arizona, Defendant. Order Enlarging Time Within Which to File Certified Transcript of Record. Filed Jul. 24, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [277]

*In the United States District Court for the District
of Arizona.*

No. 97 (Phoenix).

SMITH-BOOTH-USHER COMPANY,
Plaintiff,

vs.

DETROIT COPPER MINING COMPANY OF
ARIZONA,

Defendant.

**Order Under Rule 16, Section 1, Enlarging Time to
August 15, 1914, to File Record Thereof and to
Docket Case.**

On consideration of the application of Mr. George W. Lewis, the clerk of the District Court of the United States for the District of Arizona, and good cause therefor appearing,

IT IS ORDERED that the time within which the original certified Transcript of the Record in the above-entitled cause may be filed, and within which the cause may be docketed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be, and hereby is enlarged to and including the 15th day of August, A. D. 1914.

Judge of the United States District Court for the
District of Arizona.

Dated at Tucson, Arizona, this 1st day of August,
A. D. 1914. [278]

[Endorsements]: No. 97 (Phoenix). In the United States District Court for the District of Arizona. Smith-Booth-Usher Company, Plaintiff, vs. Detroit Copper Mining Company of Arizona, Defendant. Order Enlarging Time Within Which to File Certified Transcript of Record. Filed Aug. 1, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [279]

*In the United States District Court for the District
of Arizona.*

No. 97 (Phoenix).

SMITH-BOOTH-USHER COMPANY,
Plaintiff,

vs.

DETROIT COPPER MINING COMPANY OF
ARIZONA,

Defendant.

**Order Under Rule 16, Section 1, Enlarging Time to
August 31, 1914, to File Record Thereof and to
Docket Case.**

On consideration of the application of Mr. George W. Lewis, Clerk of the District Court of the United States for the District of Arizona, and good cause therefor appearing,

IT IS ORDERED that the time within which the original certified Transcript of the Record in the above-entitled cause may be filed, and within which the cause may be docketed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be, and hereby is enlarged to and including the 31st day of August, A. D. 1914.

(Signed) WM. H. SAWTELLE,
Judge of the United States District Court for the
District of Arizona.

Dated this 15th day of August, A. D. 1914. [280]

[Endorsements]: No. 97 (Phoenix). In the United States District Court for the District of Arizona. Smith-Booth-Usher Company, Plaintiff, vs. Detroit Copper Mining Company of Arizona, Defendant. Order Enlarging Time Within Which to File Certified Transcript of Record. Filed Aug. 15, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [281]

*In the District Court of the United States for the
District of Arizona.*

No. 97 (Phoenix).

SMITH-BOOTH-USHER COMPANY, a Corpo-
ration,

Plaintiff,

vs.

THE DETROIT COPPER MINING COMPANY
OF ARIZONA, a Corporation,

Defendant.

**Stipulation [Extending Time to File Record in
Appellate Court to August 31, 1914].**

It is hereby agreed and stipulated that the time within which the original certified Transcript of the Record in the above-entitled cause may be filed, and within which the cause may be docketed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be enlarged to and including the 31st day of August, A. D. 1914.

Dated August 20, 1914.

ELLINWOOD & ROSS,

Attorneys for Defendant.

Dated August 22, 1914.

SLOAN & WESTERVELT,

Attorneys for the Plaintiff. [282]

[Endorsements]: No. 97 (Phoenix). In the United States District Court for the District of Arizona. Smith-Booth-Usher Company, Plaintiff, vs. The Detroit Copper Mining Company of Arizona, Defendant. Stipulation. Filed Aug. 23, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [283]

*In the United States District Court for the District
of Arizona.*

SMITH-BOOTH-USHER COMPANY,

Plaintiff,

vs.

DETROIT COPPER MINING COMPANY OF
ARIZONA,

Defendant.

Praecipe for Transcript of Record.

To the Clerk of the United States District Court for
the District of Arizona:

You will please prepare a transcript of the complete record in the above-entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit under the Writ of Error to be perfected to said court

in said cause, and include in said transcript the following proceedings, pleadings, papers, records and files, to wit:

Judgment-roll; except original Complaint and Answer;

Transcript of Minute Entries;

Order Allowing Bill of Exceptions;

Bill of Exceptions;

Motion for New Trial;

Acknowledgment of Service of Bill of Exceptions;

Petition for Writ of Errors;

Assignment of Errors;

Order Allowing Writ of Error;

Bond on Writ of Error;

Writ of Error;

Citation;

Praecipe for Transcript;

Plaintiff's Ex. "C" and "D" and Defts. Ex. 6 and 7,—

and all other record entries, pleadings, proceedings, papers and filings necessary or proper to make a complete record upon said writ of error in said cause, said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

ALFRED WRIGHT,
SLOAN, SEABURY & WESTERVELT,

Attorneys for Plaintiff. [284]

[Endorsed]: U. S. Dist. Ct., Dist. of Arizona.
Smith-Booth-Usher Co. vs. Detroit Copper Mining

Co. of Arizona. Praeipie for Transcript of Record.
Filed Jul. 18, 1914, at — M. George W. Lewis,
Clerk. By R. E. L. Webb, Deputy. [285]

*In the United States District Court for the District
of Arizona.*

No. 97 (Phoenix).

SMITH-BOOTH-USHER COMPANY,
Plaintiff,

vs.

DETROIT COPPER MINING COMPANY OF
ARIZONA,
Defendant.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
District of Arizona,—ss.

I, George W. Lewis, Clerk of the United States District Court, for the District of Arizona, do hereby certify the two hundred eighty-five (285) typewritten pages, numbered from one (1) to two hundred eighty-five (285), inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the judgment of said United States District Court for

the District of Arizona, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff for the preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

[286]

Clerk's fee (Sec. 828 R. S. U. S., as Amended by Sec. 6, Act of March 2, 1905), for mak- ing typewritten transcript of record—762 folios at 20¢ per folio.....	\$152.40
Certificate of Clerk to typewritten tran- script of record—4 folios at 30¢ per folio..	1.20
Seal to said Certificate.....	.40
	<hr/>
	\$154.00

I hereby certify that the above cost for preparing and certifying record, amounting to \$154.30, has been paid to me by Messrs. Sloan and Westervelt, attorneys for plaintiff.

I further certify that I hereto attach and herewith transmit the original of Plaintiff's Exhibits "A" and "B" and of Defendant's Exhibit "1," as directed by order of the Court.

I further certify that I hereto attach and herewith transmit the original Writ of Error and Citation, issued in this cause.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the Seal of said District Court at

Phoenix, in said District, this 28th day of August,
A. D. 1914.

[Seal]

GEORGE W. LEWIS,
Clerk.

By Robert E. L. Webb,
Deputy Clerk. [287]

[Plaintiff's Exhibit "A"—Agreement, December 2,
1912, Smith-Booth-Usher Co.—Detroit Copper
Mining Co., of Arizona.]

Los Angeles, California, December 2d, 1912.

SMITH-BOOTH-USHER COMPANY, furnish
the undersigned:

Three (3) Two hundred (200) Horse Power, In-
ternational Amet Crude Oil Gas-Pro-
ducers; lined complete with brick work
and concrete, with all Piping and
Valves as shown in cut on the first
page of the Company's Bulletin here-
to attached;

With Scrubbers, Oil Pump, Plans
and Specifications for installation;

Shipment to be made by the Company in approxi-
mately forty-five (45) days from date of acceptance
of this agreement.

PRICE of the above machinery.....\$10,000.00.

DELIVERY f. o. b. cars Morenci, Arizona.

In consideration of the above the Purchaser agrees
to pay you the sum of Ten Thousand (\$10,000) Dol-
lars, payable in the City of Los Angeles, upon the
following terms;

On completion of ninety (90) days trial, should
the apparatus meet the guarantees herein specified,

or any time prior to the end of the ninety (90) days' trial, herein specified, should the Purchaser so elect.

The Purchaser agrees to pay interest at the rate of six (6%) per cent per annum from date of erection until paid.

It is expressly agreed that the title to said property shall not pass until the purchase price or any judgment for the same is fully paid and shall remain your property until that time whatever be the mode of its attachment to the realty or other property.

You may, if you so elect, waive all right of ownership in the above described property and shall thereupon become an unsecured creditor for the full amount of the unpaid purchase price.

There shall be no change of the location of said property nor any transfer, assignment, mortgage or pledge thereof, without your written consent.

The covenants herein shall apply to all additions made to said property, but you assume no responsibility for work done, apparatus furnished and repairs made by others. [288]

COMPANY GUARANTEE.

The within described machinery is subject to the following warranty agreements:

That it shall be as described in the manufacturers' bulletin attached hereto, or of the latest improved design;

That it is to be well made of first class material and workmanship and should any part prove defective within one (1) year from date of sale, through defective material or workmanship the Company shall furnish duplicates of such parts free to the

Purchaser, f. o. b. cars Morenci, Arizona, provided however the defective part is first returned to the Company for inspection at the Company's expense, should they so require.

It is understood and agreed that any machinery which the Company may furnish is guaranteed to properly perform the duty for which it is known to be intended by the Parties hereto, but the Company will not be responsible when the machinery is installed under any other conditions than those recommended by the Company or the Company's Engineer.

The Company guarantees the within described apparatus when working within 90% of its normal rated capacity of 600 H. P. and using California Asphaltum base crude oil, ranging from 14 to 18 degrees Baume, reduced to 60 degrees Fahr., containing not less than 18,500 B. T. U. per pound and weighing approximately 7.8 pounds per gallon; ~~and containing not more than one per cent (1%) moisture or a trace of sediment or other impurities;~~ to deliver at least 415 cubic feet of gas of at least 190 B. T. U. low value for each gallon of said oil fired, or one (1) gallon of oil as above defined will produce 78,500 B. T. U. in heat value of gas ranging from 190 to 210 B. T. U. low value per cubic feet; the gas to be of uniform quality within range of 5 B. T. U. of determined B. T. U. content of gas in regular operation and to be of similar analytic composition as that given in Manufacturers' bulletin hereto attached.

N. T. T.
S. J. S.

There will be no suspended matter contained in the gas which will be injurious to the Engines or gas conducting Pipes; samples of the gas to be taken

from main after leaving holder delivering gas to Engine.

The Company agrees to furnish the plans and specifications for installation and to furnish the Purchaser an operating Engineer at Six (\$6.00) Dollars per day and expenses from date of leaving Los Angeles, until date of return. [289]

PURCHASERS' GUARANTEE.

The Purchasers agree to furnish—

Wash-water Pump

Blower

Piping

15,000 ft. Gas Holder.

and to notify the Company when the apparatus is ready for operation that the Company may send an operating Engineer to properly instruct the Purchasers' employee in the operation and care of the apparatus herein specified.

Upon arrival of apparatus at Morenci to immediately commence to carry on the work of installing the apparatus with due diligence until same is completed all in accordance with the Company's plans and specifications.

To pay to the Company in addition to the purchase price herein set forth, the sum of Six (\$6.00) Dollars per day and expenses for the Company's operating Engineer.

To notify the Company when the apparatus herein specified is ready for operation that the Company may send their operating Engineer as herein specified.

To commence the operation as soon as practicable

after completion of the installation and to operate same in accordance with the instructions of the Company's Engineer for a period of ninety (90) days, subject to adjustments of Gas Plant necessary to cause the machinery to give results provided for in this agreement.

At the end of said ninety (90) days' operation as herein specified, should the Purchaser fail to obtain the results in accordance with the above guarantees, then the Purchaser shall have the right to dismantle the apparatus, load such parts as were received from the Company on board cars for shipment in accordance with the Company's shipping instructions and no payment nor obligation of the Purchase Price on the part of the Purchaser will be required except that which applies to the operating Engineer and the Company shall not be liable for any claim or damage except the return of any part of the Purchase Price paid except that which might have been paid for the operating Engineer.

TIME is expressly of the essence of this agreement. The above agreement is subject to the approval of an Officer of the Company.

(Signed) SMITH-BOOTH-USHER COMPANY,

By S. J. SMITH, Prest.

(Approved) J. S. MICKELL,

Secy.

(Signed) THE DETROIT COPPER MINING CO., OF ARIZONA,

(Seal) By N. T. THOMSON, (Seal)

General Manager.

INTERNATIONAL AMET GAS POWER
COMPANY

Crude Oil Gas Producers—Amet-Ensign Patents

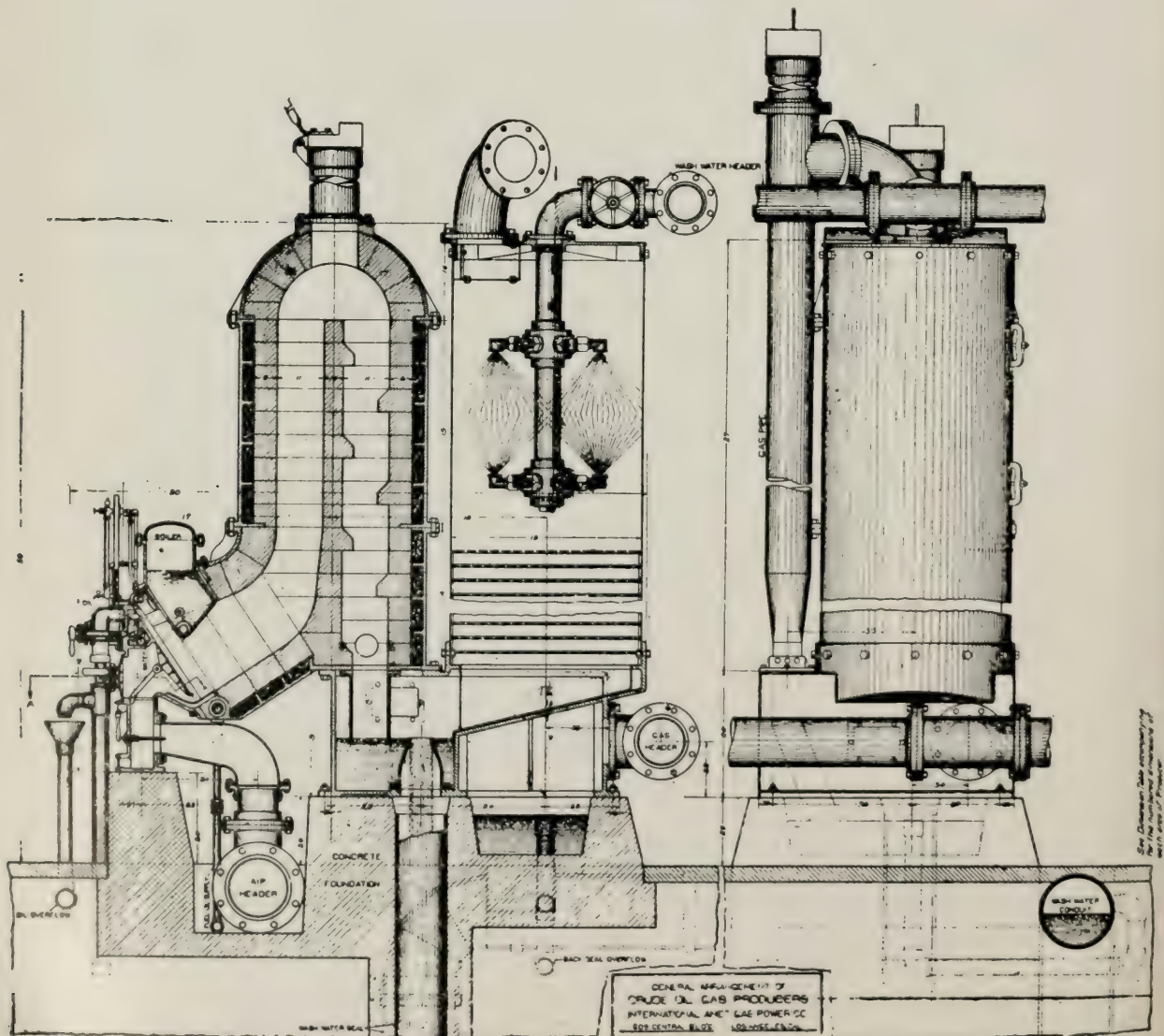
609 Central Building

Los Angeles, California

APPARATUS FOR PRODUCING FIXED GAS FOR OPERATING GAS ENGINES

THE MOST ECONOMICAL WAY TO PRODUCE POWER FROM CRUDE OIL

Producers Have Been Thoroughly Tried Out by Years of Successful Operation



Sectional Elevation [291]

The great economy of the internal combustion engine and the perfection of such engines so that they are equal in reliability of service to steam engines, as shown by many thousands of horse power of such engines now in constant operation, has led to the development of apparatus for making power gas from crude oil for use in gas engines.

By the Amet-Ensign method the same amount of power may be obtained from a gallon of crude oil as from a gallon of gasoline or distillate, with a saving of the difference in cost of at least three-fourths. As compared with the ordinary steam plant the saving is at least two-thirds and as compared with very large high-class steam plants with all the refinements of superheat and condensation the saving is still at least one-third.

These economies are now within the reach of all power users by the installation of Amet-Ensign gas producers, which convert crude oil into an absolute fixed gas; have been thoroughly tested and perfected by years of successful operation under practical everyday, continuous, operating conditions and are fully guaranteed. This guarantee extends to the removal of the apparatus and refund of cost if not fulfilled.

The producers are of simple construction, practically indestructible in ordinary use (as shown by the fact that no repairs have been necessary on those in use for several years, and require no more skill or labor to operate than an ordinary steam boiler fired with oil.

Four sizes are made at present as shown below.

Plants of more than 400 horse power are supplied with the requisite number of units to make up the required power.

Horse-Power.	Floor Space.		Total Weight: Producer & Auxiliaries.
	Producer.	Auxiliaries.	
100	3'-2"x8'-0	5'-0"x10'-0"	10,000 lbs.
200	3'-8"x9'-0	5'-6"x11'-0"	13,500 lbs.
300	4'-0"x9'-3	6'-0"x12'-0"	18,000 lbs.
400	4'-6"x9'-6	7'-0"x14'-0"	22,000 lbs.

In addition to the producer and auxiliaries, which would ordinarily be installed inside the power plant, space will be required outside the building for a small gas-holder. The weights of these holders will range from 3,500 lbs. for 100 H. P. to 13,500 for 400 H. P. There will also be required, a circulating water tank of capacity at the rate of 20 gallons per H. P. and if the water used for washing cannot be wasted, a small cooling tower which will permit the same water to be used continuously.

The full reliability and effective operation of the apparatus is susceptible of complete demonstration by plants installed and in operation. The construction of the producers and method of operation are explained below.

In making producer gas from crude oil it is absolutely essential that the proper relative amounts of air and oil be maintained and that these relative proportions remain fixed under variations in the amount of gas made, as required by variations in the load on the engines. In the Amet-Ensign producers the amounts of air and oil are adjustable and under the control of the operator, but after adjustment has been made, the relative proportions remain auto-

matically constant so that the output of gas can be varied over a wide range as may be required by fluctuations of load, with practically constant thermal value of the gas.

The oil (maintained at uniform temperature by a thermostatically controlled heater) is fed in from a weir-box having an adjustable needle valve, the rate of flow being controlled by air pressure brought to the top of the oil from a special form of Pitot tube which is located in the air main and which practically measures the quantity of air entering the producer by the well-known action of that device, thus making the flow of oil proportional to the amount of air used. As the gas-holder rises it engages a lever connecting with a balanced relief valve on the air main, gradually reducing the total pressure so that the make of gas falls off in response to the decreased demand. Thus complete automatic governing is secured by comparatively simple means without disturbing the relative amounts of air and oil and the same grade of gas is delivered in greater or less quantity as demanded by the power output of the plant.

The oil, as fed in from the weir-box, runs down the adjacent inclined plate, and the air, entering from below, passes around the lower edge of the plate, maintaining combustion of such oil as reaches that point. The products of combustion, and of distillation from the upper part of the plate, pass up through the brick-lined combining tube and down again to the first water seal. Sufficient heat is maintained to effect complete gassification, the carbon dioxide formed by the initial combustion being largely con-

verted back into carbon monoxide by combination with the glowing free carbon originating from the decomposition of some of the lighter hydrocarbons of the oil. Increased efficiency may be obtained by the injection of a small amount of steam, generated by a small boiler placed in the upper part of the producer and utilizing what would otherwise be waste heat.

By this system a gas is made having the desirable low free hydrogen content and utilizing the remaining hydrogen by its conversion into effective gases so that about 70% of the heat value of the gas is in fixed hydrocarbon compounds and giving an efficiency of operation impossible with systems where the hydrogen is wasted.

A typical analysis of the gas produced by the Amet-Ensign process is as follows:

	Per cent	B. T. U.
CO ₂	7.4	
O ₂	.3	
CO	8.6	27.8
Illuminants	4.7	99.7
CH ₄	6.6	66.6
H ₂	11.	35.9
<hr/>		<hr/>
	Total	230.0
	Low value,	216.7

After passing the first water seal, the gas goes through the usual washing or scrubbing process, to remove suspended particles, the extent to which this is carried being dependent on the subsequent use of the gas, effective appliances for this purpose being supplied with the producers, which it is unnecessary

to describe here as they are of every day use in all gas works whatever the system of gas making employed. It should be noted, however, that for engine use it is unnecessary to clean the gas made by the Amet-Ensign process to a greater extent than to prevent deposits in the pipes, as there has never been a case of the slightest injury to engine cylinders, from carbon with Amet-Ensign gas. Cylinders which have been in use several years are perfectly clean and show no appreciable wear.

While this system is more economical than any other wherever crude oil can be obtained at reasonable cost, it offers special advantages in localities where transportation of fuel is high and where water is scarce or of bad quality.

Plans, specifications and complete data on electric, pumping, or other power plants will be furnished and contracts made covering either partial or complete installations.

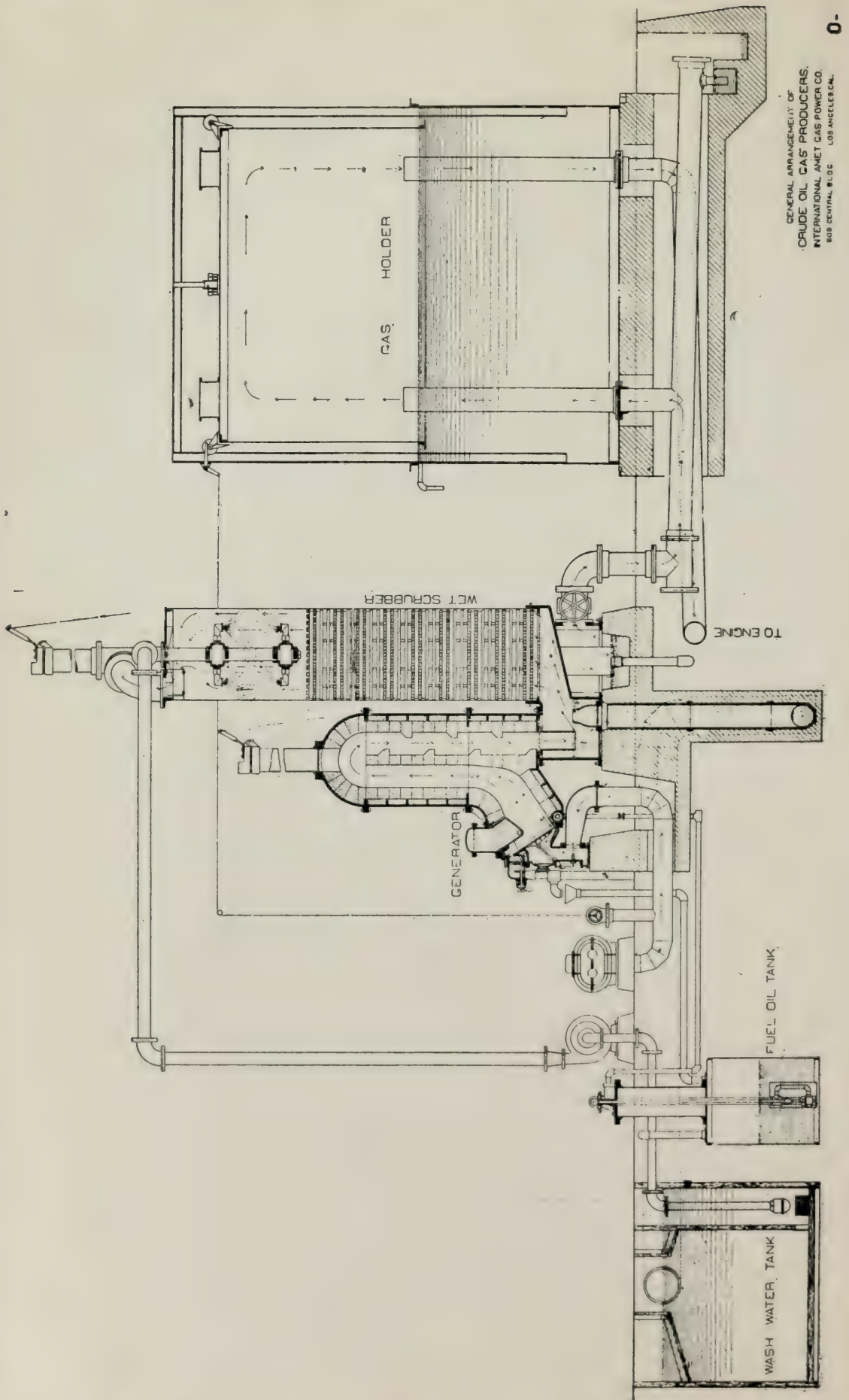
Address Inquiries to W. F. STAUNTON, Sales Agent.

INTERNATIONAL AMET GAS POWER
CO.,

609 Central Building, Los Angeles, California.

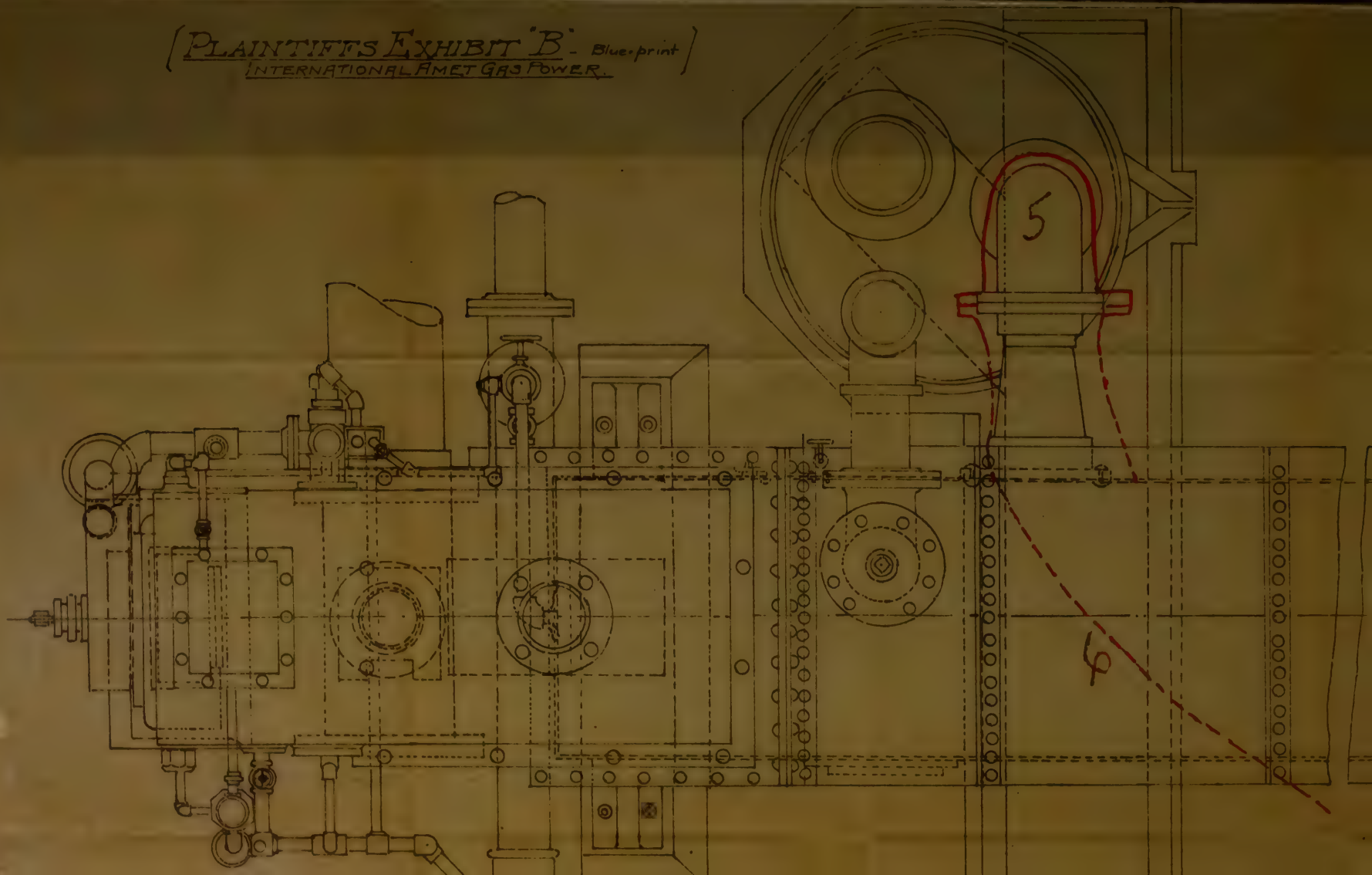
Or to SMITH-BOOTH-USHER CO.,

228 Central Avenue, Los Angeles, California. [292]

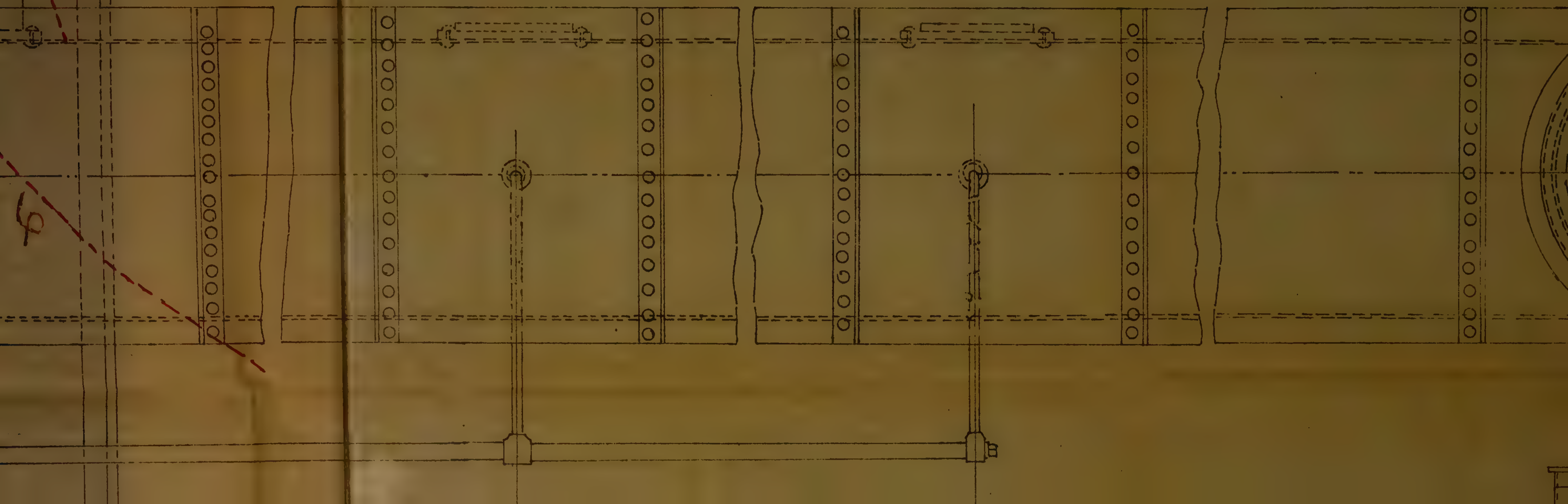


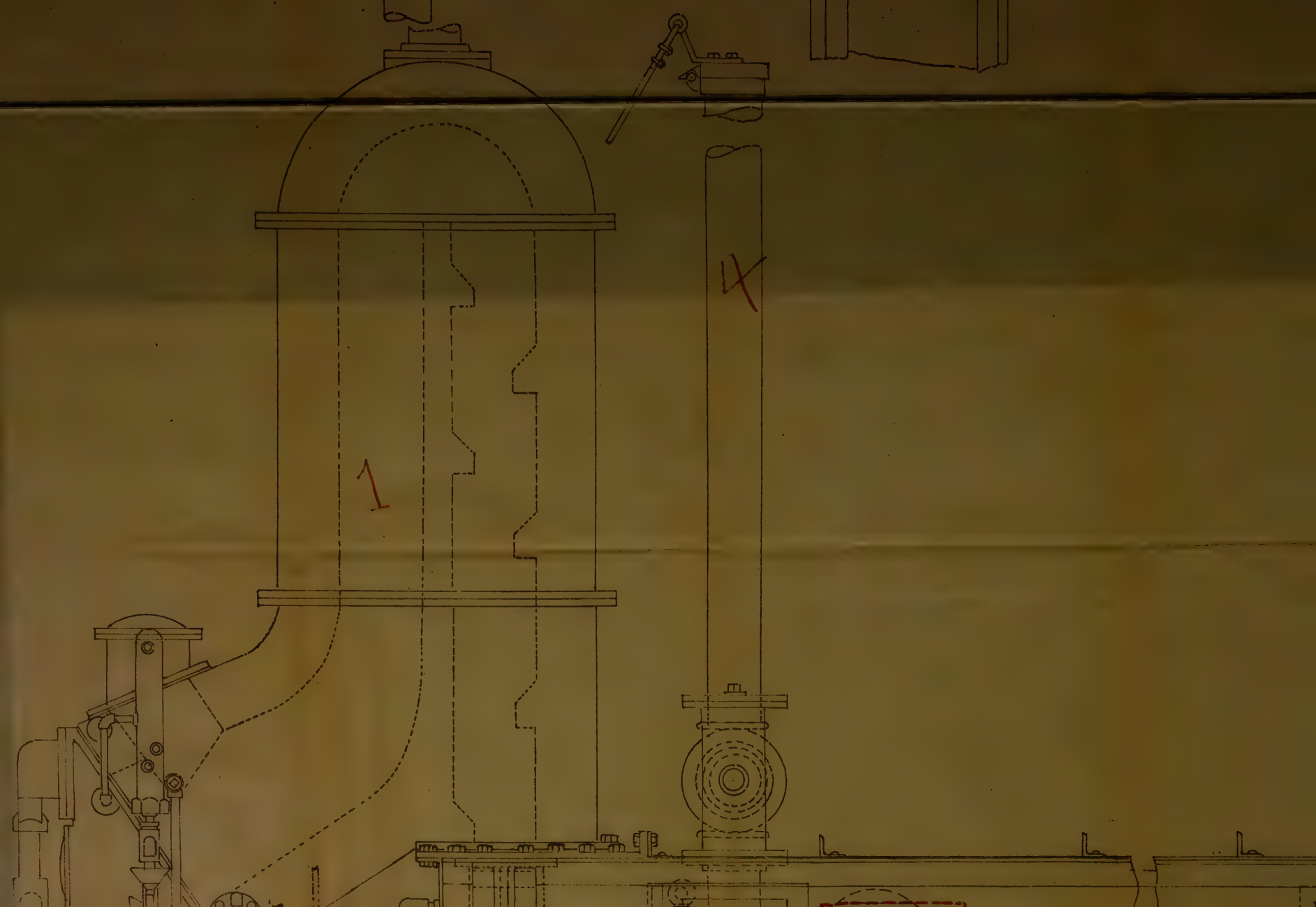
Pltf's. Ex. "A." in case #97. Admitted. Filed
Jan. 23, 1914. George W. Lewis, Clerk. [293]

(PLAINTIFFS EXHIBIT "B" - Blue-print)
INTERNATIONAL AMET GAS POWER.



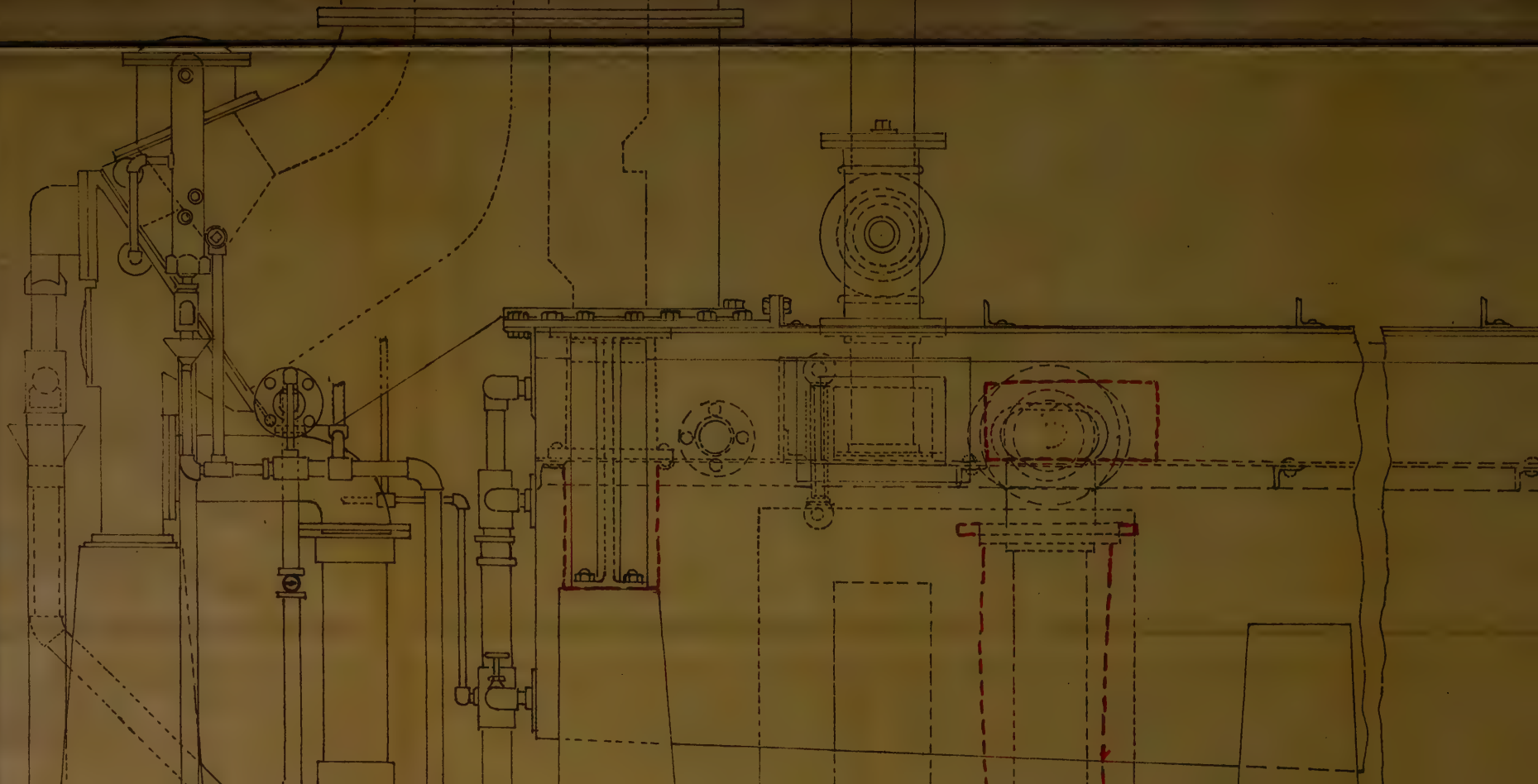
Plf's Ex B. } admitted
in #97 } Filed Jan 24. 1914
George Lewis
clerk.

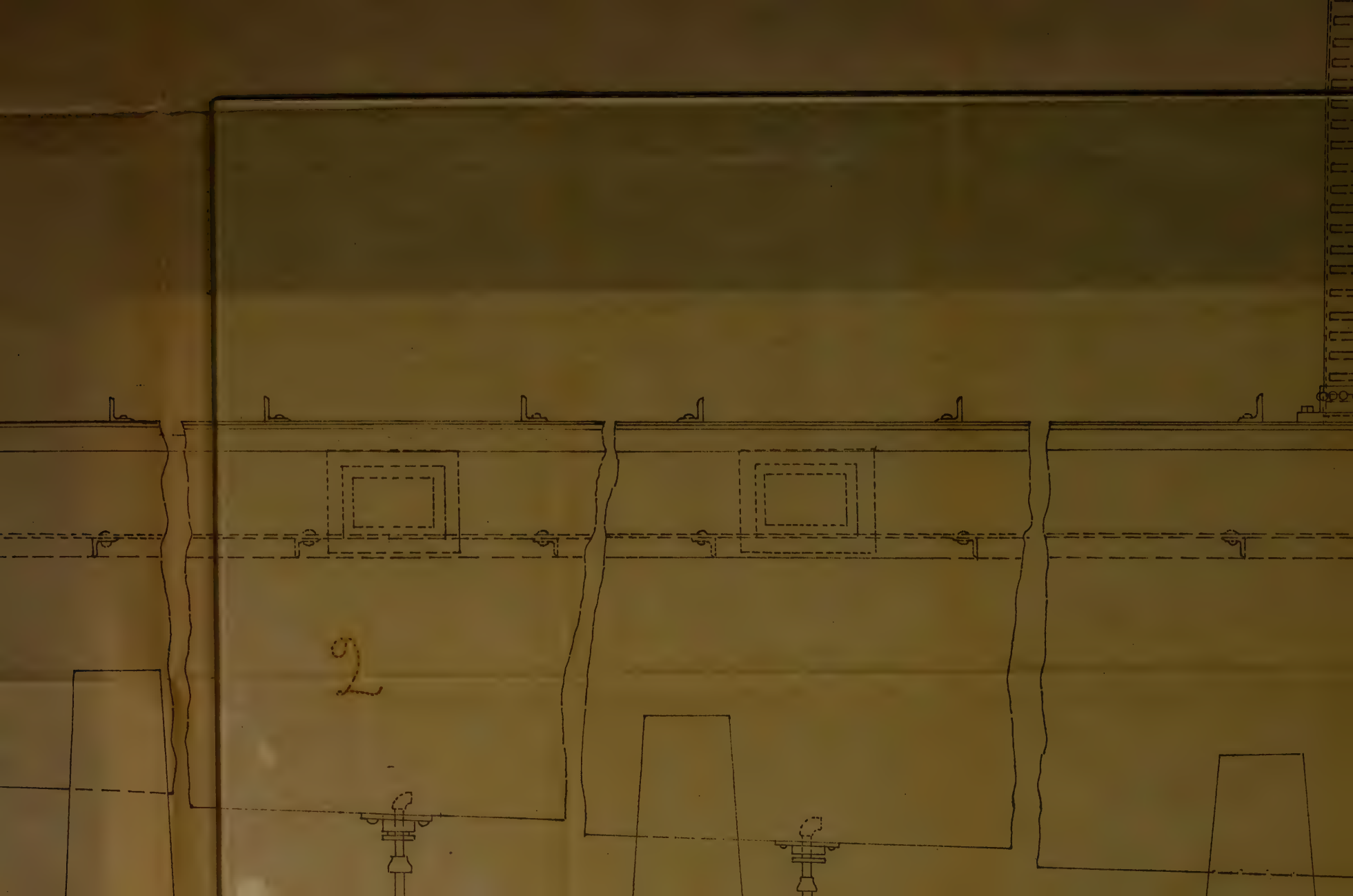




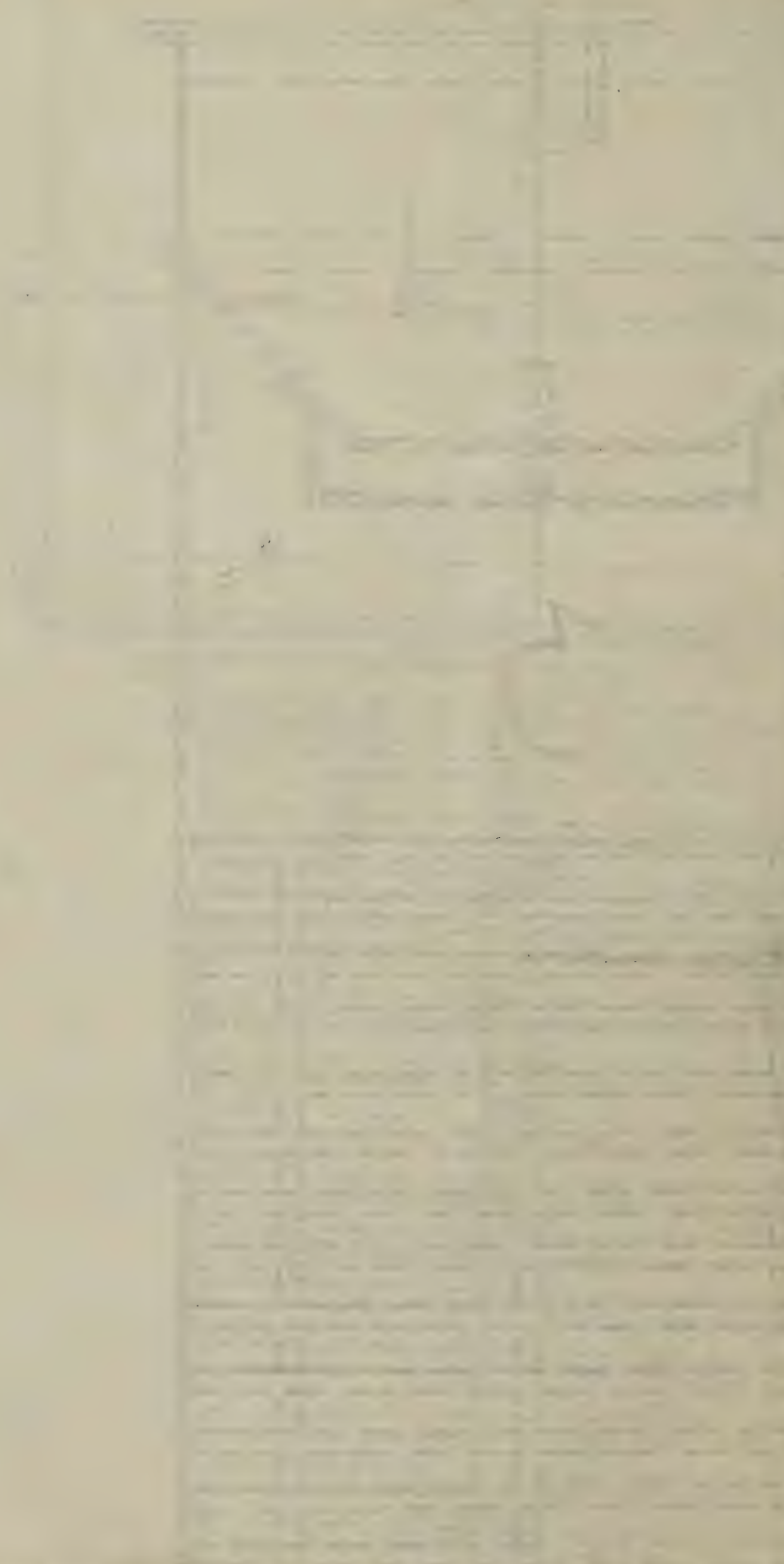


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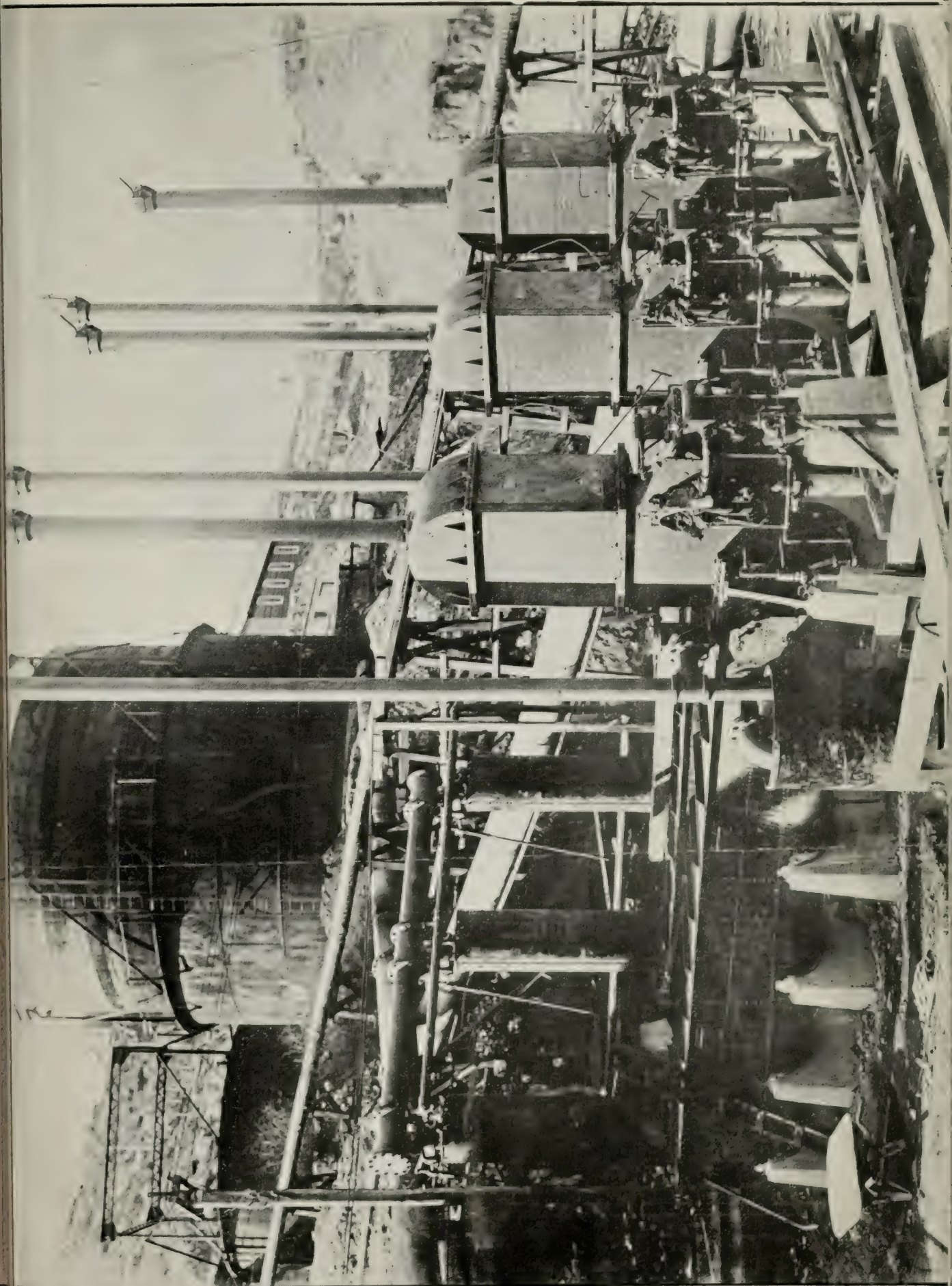




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[Defendant's Exhibit 1—Photograph.]



*In the United States District Court for the District
of Arizona.*

SMITH-BOOTH-USHER COMPANY,

Plaintiff,

vs.

DETROIT COPPER MINING COMPANY OF
ARIZONA,

Defendant.

Writ of Error [Original].

The President of the United States to the Honorable
Judge of the United States District Court for
the District of Arizona, Greeting:

Because in the records and proceedings, as also
in the rendition of the judgment, of a plea which is
in the said District Court before you, between Smith-
Booth-Usher Company, plaintiff, and Detroit Copper
Mining Company of Arizona, defendant, a manifest
error has happened, to the great damage of the said
Smith-Booth-Usher Company, plaintiff, as by its com-
plaint appears, we being willing that error, if any
hath been, shall be duly corrected, and full and speedy
justice done to the parties aforesaid in this behalf, do
command you, if judgment be therein given, that then
under your seal, distinctly and openly, you send the
record and proceedings aforesaid, with the things con-
cerning the same, to the United States Circuit Court
of Appeals for the Ninth Circuit, together with this
writ, so that you have the same at San Francisco,
California, in said Circuit, within thirty days of the
date of this writ, in said Circuit Court of Appeals,

to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States shall be done. [296]

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this the 24th day of June, A. D. 1914, and of the Independence of the United States the one hundred and thirty-sixth.

Allowed:

WM. H. SAWTELLE,
United States District Judge.

GEO. W. LEWIS,
Clerk.

By R. E. L. Webb,
Deputy Clerk. [297]

[Endorsed]: U. S. Dist. Ct., Dist. of Arizona. Smith-Booth-Usher Co. vs. Detroit Copper Mining Co. of Arizona. Writ of Errors. Filed Jun. 24, 1914, at — M. Geo. W. Lewis, Clerk. By R. E. L. Webb, Deputy. [298]

*In the United States District Court for the District
of Arizona.*

SMITH-BOOTH-USHER COMPANY,

Plaintiff,

vs.

DETROIT COPPER MINING COMPANY OF
ARIZONA,

Defendant.

Citation [on Writ of Error (Original)].

The President of the United States, to Detroit Copper Mining Company of Arizona, and to Ellinwood & Ross, Your Attorneys, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, California, in said circuit, within thirty (30) days from the date of the writ, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Arizona, wherein Smith-Booth-Usher Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court, this the 24th day of June, 1914, and of the Independence of the United States the one hundred and thirty-sixth.

WM. H. SAWTELLE,
United States District Judge for the District of
Arizona. [299]

Service of a copy of the within citation is hereby admitted.

Dated Bisbee, July 2, 1914.

ELLINWOOD & ROSS,
Attorneys for Defendant.

[Endorsed]: U. S. Dist. Ct., Dist. of Arizona.
Smith-Booth-Usher Co. vs. Detroit Copper Min-

Detroit Copper Mining Company of Arizona. 335
ing Co. of Arizona. Citation. Filed Jun. 24, 1914,
at — M. Geo. W. Lewis, Clerk. By R. E. L.
Webb, Deputy. [300]

[Endorsed]: No. 2472. United States Circuit
Court of Appeals for the Ninth Circuit. Smith-
Booth-Usher Company, a Corporation, Plaintiff in
Error, vs. Detroit Copper Mining Company, of
Arizona, a Corporation, Defendant in Error. Tran-
script of Record. Upon Writ of Error to the United
States District Court of the District of Arizona.

Received and filed August 31, 1914.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Plaintiff's Exhibit "C"—Letter Dated May 28,
1913, A. T. Thomson, General Manager Detroit
Copper Min. Co., to Smith-Booth-Usher Co.]

THE DETROIT COPPER MINING CO. OF
ARIZONA.

General Offices, Mines and Reduction Works,
Morenci, Arizona.

New York Office, 99 John Street.

A. T. THOMSON,

General Manager.

File 398

May 31, 1913.

S. J. S.	J. A. N.
T. L. S.	L. M. M.
J. A. H.	R. A. C.
J. R. H.	E. J. S.
C. L. M.	H. E. W.
F. W. C.	H. P. B.
H. P. U.	B. S. B.
G. C. S.	H. A. O.
J. F. H.	S. P. M.
L. M. S.	T. L. H.
C. W. W.	J. B.
E. B. A.	A. S. C.

Morenci, Arizona, May 28th, 1913.

Smith-Booth-Usher Company,
228-238 Central Avenue,
Los Angeles, Cal.

Gentlemen:

Your favor of May 24th received to which we re-
plied by wire.

This decision was reached after careful consideration of the case, and our reasons for doing so are not so much because we doubt that you could finally make clean gas, but because the apparatus required for this and for handling the soot far exceeds anything we were led to expect when we negotiated for the plant.

We never expected to make much reduction in our fuel costs when we installed your plant, but we did expect to make a saving on labor and we were led to believe by your representations that a plant could be installed so easily and required so little ground space that if the first plant was successful we expected to install another at our main power house, thus doing away with the necessity for replacing a costly pipe line for transmitting the gas.

S-B-U Co.

5/28/13

Owing to the excessive amount of soot made and the labor required to handle it, we find that we can make no saving in labor at all, and owing to the unexpectedly large amount of washing apparatus and the ground space necessary for settling ponds and cooling towers, we find it quite out of the question to install another oil gas plant near our main power house under any circumstance.

Although your representative was on the ground and approved of the site chosen for the plant, we find that this is not satisfactory and that the entire plant would have to be either elevated six feet or moved to a new site altogether. Either of these alternatives would be expensive changes nor would it conclude the extent of our expenses; it would be necessary as

well to increase our pumping capacity, increase the size of our cooling tower and deepen the settling pond, expensive, and difficult alterations to effect.

We are much disappointed in this result of our experiments as the futile expense we have already gone to should indicate, but we realize that to proceed in the business would entail a further positive and heavy loss to ourselves.

We have gone into this matter more in detail than is perhaps necessary but it is done as a matter of courtesy to you and to let you understand no snap judgment was taken in arriving at our decision to go no further with your plant. We will therefore ask you to have the plant dismantled and if desired shipped at as early a date as possible.

Yours truly,

(Signed) A. T. THOMSON,

T.

General Manager.

[Endorsements]: Plffs. Ex. "C." in #97. Admitted. Filed Jan. 26, 1914. George W. Lewis, Clerk.

[Plaintiff's Exhibit "D"—Telegram, Dated May 27, 1913, A. T. Thomson, Detroit C. M. Co., to Smith-Booth-Usher Co.]

CONFIRMATION

May 29, 1913.

S. J. S.	J. A. N.
T. L. S.	L. M. M.
J. A. H.	R. A. C.
J. R. H.	E. J. S.
C. L. M.	H. E. W.
F. W. C.	H. F. B.
H. P. U.	B. S. R.
G. O. S.	H. A. O.
J. F. H.	S. P. M.
L. M. S.	T. L. H.
C. W. W.	J. B.
E. B. A.	A. S. C.

RECEIVED
JUN. 27, 1913.
SMITH-BOOTH-
USHER CO.

Refer to ———

Morenci, Arizona, May 27, 1913.

Smith-Booth-Usher Company,
228-238 Central Avenue, Los Angeles, Cal.

Referring your letter twenty-fourth, we are writing you but have decided to go no further with your plant.

A. T. THOMSON,
DETROIT C. M. CO.

* * * * *

[Endorsements]: Plffs. Ex. "D" in #97. Admitted. Filed Jan. 26, 1914. George W. Lewis, Clerk.

**[Certificate of Clerk U. S. District Court to Certified
Copy of Plaintiff's Exhibits "C" and "D."]**

*In the United States District Court for the District
of Arizona.*

United States of America,
District of Arizona,—ss.

I, George W. Lewis, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing three (3) pages, numbered from one (1) to three (3), inclusive, to be a full, true, correct and complete copy of the Plaintiff's Exhibits "C" and "D," in the case of the Smith-Booth-Usher Co. vs. The Detroit Copper Mining Co. of Arizona, as they appear from the original record thereof remaining on file in this office, and which should have been attached and included in the transcript of record in the above-entitled cause, transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, San Francisco, California, under date of August 28, 1914.

WITNESS my hand and the seal of said Court,
affixed this 20th day of October, A. D. 1914.

[Seal]

GEORGE W. LEWIS,
Clerk.

By Robert E. L. Webb,
Deputy Clerk.

[Endorsed]: No. 97 (Phoenix). United States District Court for the District of Arizona. Smith-Booth-Usher Company, Plaintiff, vs. Detroit Copper Mining Company of Arizona, Defendant. Certified Copy of Plaintiff's Exhibits "C" and "D," to be Made a Part of the Transcript of Record.

No. 2472. United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 22, 1914. F. D. Monckton, Clerk.

No. 2472

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Smith-Booth-Usher Company,
Plaintiff in Error,

vs.

Detroit Copper Mining Company
of Arizona,
Defendant in Error.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

OSCAR C. MUELLER,

ALFRED WRIGHT,

WILLIAM M. SEABURY,

*Attorneys for Plaintiff, with Whom John de R. Storey
Was on the Brief.*

Filed

OCT 9 - 1914

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

F. D. Monckton,

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Smith-Booth-Usher Company,	}
<i>Plaintiff in Error,</i>	
<i>v's.</i>	
Detroit Copper Mining Company	
of Arizona,	}
<i>Defendant in Error.</i>	

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

This is a writ of error directed to the United States District Court in Arizona to renew the proceedings and judgment entered in said United States District Court on the 28th day of January, 1914, upon a verdict directed by the learned court below at the close of plaintiff's case in favor of the defendant and against the plaintiff.

STATEMENT OF FACTS.

On the 5th day of December, 1912, the Detroit Copper Mining Company of Arizona (hereinafter called the "defendant") entered into a written contract with the Smith-Booth-Usher Company (hereinafter called the "plaintiff"). By the terms of this contract the

plaintiff undertook to furnish to the defendant three 200 horsepower International Amet Crude Oil Gas Producers as shown on the cut in the manufacturer's bulletin attached to the contract and in accordance with certain specifications set forth in the contract. The machinery was to be as described in the manufacturer's bulletin, or of the latest improved design. The shipment was to be made from Los Angeles and the delivery was to be at Morenci, Arizona, where the defendant's plant is located. The defendant was to pay plaintiff ten thousand dollars with interest at six per centum from date of erection upon the completion of the 90 days' trial provided for by the contract should the apparatus meet the guarantees specified, or at any time prior to the end of the 90 days' trial should the defendant so elect [Exhibit A, p. 317].

The purpose of the machinery as its name indicated, was to produce gas from crude oil. It consisted of three principal units, each of which had no connection with the others, except that all furnished gas into the same main [p. 14]. These units, with the oil pump, constituted the entire machinery which the plaintiff was to furnish under the contract. In order to complete this gas producing plant the defendant was to furnish a 15,000 cubic feet gas holder and the auxiliary machinery, including pipes and mains [Exhibit A, p. 320].

The apparatus was shipped from Los Angeles the latter part of February, 1913. At the request of defendant the plaintiff's erecting engineer, Lawrence Vorhees, went to Morenci about March 8, 1913, and

superintended the erection of this machinery [p. 140]. The plant was erected about March 27, 1913 [p. 152]. J. H. Cox, who was plaintiff's sales engineer, went to Morenci about April 2, 1913, and began the tests of this machinery pursuant to the contractual provision for a 90 days' trial [pp. 152, 154]. These tests were continued by Mr. Cox until about May 7, 1913, when with the consent of defendant he left Morenci, pending the purchase of a new washer for the machinery, with the intention of returning and continuing the tests on behalf of the plaintiff [pp. 169-192]. However, on May 28, the defendant advised the plaintiff that the defendant would go no further with the tests under the contract, though as a matter of fact only a little over one third of the 90 days' trial had been allowed the plaintiff [pp. 191, 275-6]. The defendant refused to continue with the contract and refused to pay for the machinery [pp. 191-2].

On July 17, 1913, plaintiff filed its complaint herein. This complaint counted on the written contract alleging performance by plaintiff and breaches by defendant in failing to supply a large gas holder and in refusing to go on with the test or pay for the apparatus. The complaint also contained a plea for recovery on the common count. The summons was served herein on the plaintiff on July 27, 1913, and the answer filed August 11, 1913.

SPECIFICATION OF ERRORS.

Plaintiffs in error contend that the learned court erred in the following respects:

1. In determining all questions of fact presented by the plaintiffs in error; in not allowing these issues to be passed upon by the jury and in instructing the jury as follows: "Gentlemen of the jury, you are instructed in this case to return a verdict in favor of the defendants." [Transcript, p. 304.]

2. In excluding evidence offered by plaintiff in error tending to show that the effect of gas similar to that produced in the plant in question upon gas engines and pipes similar to those used by defendant in error was not injurious in other plants.

3. In excluding the evidence of qualified experts offered by plaintiff in error tending to show the performance of the contract by the plaintiff in error.

4. In excluding evidence offered by plaintiff in error tending to show the reason for the departure of plaintiff in error's engineer from the plant prior to the expiration of the ninety days' trial of the machinery provided for by the contract and tending to show that such departure was entirely in harmony with and not a breach of the contract sued upon, but was in effect a breach of said contract on the part of defendant in error.

5. In excluding evidence offered by plaintiff in error tending to show the result of the tests to determine the quality of the gas produced by the plant in question and to show that on such tests the gas fully met the guarantees contained in the contract.

6. In excluding expert evidence offered by the plaintiff in error tending to show that the suspended matter contained in the gas produced by the plant in question was not injurious to the engines or gas conducting pipes of defendant.

7. In admitting evidence introduced by defendant in error purporting to show the intention of the parties to the contract outside of the contract itself.

8. In excluding evidence offered by plaintiff in error of conversations of plaintiff in error's engineer with the employees and officers of defendant in error who were authorized to bind defendant in error.

9. In admitting evidence introduced by defendant in error purporting to show that the gas holder provided by the terms of the contract to be furnished by defendant in error was larger than necessary for the operation of the plant in question and that the smaller holder actually furnished by defendant in error was of a sufficient size to operate the plant.

10. In excluding testimony offered by plaintiff in error tending to show the limits of the authority of plaintiff in error's engineer and his lack of authority to bind the plaintiff in error or to modify the contract sued upon in this action.

11. In excluding testimony supporting the second cause of action contained in plaintiff in error's complaint, which testimony tended to show the reasonable value of goods, wares and merchandise sold and delivered to defendant in error.

12. In denying the motion of plaintiff in error for a new trial.

POINTS.

I.

The Court Erred in Directing a Verdict by the Jury at the Close of the Plaintiff's Case in Favor of Defendant, in Determining All Questions of Fact Presented by the Evidence, and in Not Allowing these Issues to be Passed Upon by the Jury.

At the end of the plaintiff's case on motion of the defendant, the learned court below instructed the jury to return a verdict in favor of defendant [pp. 298-304]. This the jury did.

A plain issue of fact was presented by the proof even upon the evidence admitted and without the evidence erroneously excluded. This proof should have been submitted to the jury. Instead the court decided these issues himself and not only decided them but decided them erroneously.

The machinery was erected about March 27, 1913, by Mr. Vorhees, who was plaintiff's erecting engineer [p. 152]. Vorhees did not conduct the tests provided for under the contract, but remained as operating engineer under Mr. Cox until the latter part of April, when Mr. Canning took his place as operator [pp. 150, 154-5].

The machinery as installed consisted of three 200 horsepower units International Amet Crude Oil Gas Producers [pp. 141, 166]. Each unit was 24 inches wide, 24 feet long and about nine feet high. They were erected side by side, but had no connection with each other except in so far as they all furnished gas into the same main [p. 141]. The process of producing gas

in each unit is briefly this: The oil is fired and the resulting gas mixing with the air goes through combining tubes into the washer [p. 163]. The washer consisted of an horizontal tank 7 feet long filled with water. Across the width of the washer ran a diaphragm or horizontal plate [p. 143]. The gas goes through this washer under the diaphragm mixing with the water and then rises at the end of the washer [p. 164]. The water and most of the lamp black produced by the ignition of the oil is at this point discharged out of the producer. The gas goes on through a vertical washer or, as it was more frequently called at the trial, scrubber, erected on top of the horizontal washer [p. 164]. This scrubber was equipped with wash trays of lattice work and a water spray, through which the gas passed, being thus subjected to a further cleansing [p. 164]. The gas then discharged into a header, or pipe, and from there went through the gas main into a holder which was approximately three hundred feet away from the units [p. 142].

The holder consists of a tank with water and an inverted tank inside which rises as the gas goes in [p. 142]. This holder has several functions. It keeps an even pressure upon the pipe line system and the plant. It allows the components of the gas to come to rest at a low velocity and to thoroughly mix. It acts as a storage tank creating a reserve to keep the engines running during the burn-out periods required by the system [pp. 155, 237, 268]. The holder is also used to measure the quantity of gas made [pp. 169, 186, 235,

272]. Finally, and most important, the holder allows the gas to rest and any lamp black or suspended matter the gas may contain to settle at the bottom of the holder [pp. 143, 156, 205, 293].

After leaving the holder, the gas was to go through pipes and operate the defendant's machinery which was approximately at about one thousand feet from the units [pp. 151, 214].

Under the contract all the plaintiff had to do was to furnish the three 200 horsepower Amet Crude Oil Gas Producers and an oil pump [pp. 141-4, 6]. The piping, blower and water pump were to be furnished by the defendant [p. 320]. The defendant undertook also to furnish a 15,000 cubic feet holder [p. 320].

When Mr. Cox arrived at Morenci on or about April 2, 1913, to conduct the 90 days' test of the gas plant on behalf of the plaintiff he found the machinery which was to be furnished by the plaintiff under the contract completely installed in accordance with the plans and specifications [pp. 166-7]. The only change from the specifications was that instead of installing a vertical washer or scrubber they installed both a vertical and an horizontal washer or scrubber [pp. 155, 158, 291]. This was fully within the contract as the 90 days' test was evidently agreed upon in order to enable plaintiff to make such adjustments and changes as might be necessary to attain the results provided for by the contract, and the contract itself provided that the plant should be as described in the manufacturer's bulletin attached thereto or of the latest improved design. In this connection the wording of the

third guarantee is also to be noted: "It is understood and agreed that *any machinery* which the company may furnish," etc.

There is no question as to the installation of this machinery in accordance with the contract as far as the plaintiff was concerned. The proof to that effect was ample [pp. 143-5, 151, 152, 154-6, 157, 158, 166-7, 185, 193, 194]. The material and workmanship were of the first class [pp. 151, 193-4]. Indeed, the court, in his opinion does not seriously question that the machinery was completely installed from the physical point of view. Plaintiff furnished plans and specifications and an operating engineer in accordance with the contract [pp. 151-2]. The defendant waived all question of delay in shipment [pp. 148-9]. The court decided that "the question is whether or not the plaintiff did meet all the guarantees specified in the agreement [p. 299]. We submit that this question is not thus fairly stated by the learned court, as it must be necessarily modified by defendant's failure to provide plaintiff with a 15,000 cubic feet holder for the purposes of the 90 days' test, and by defendant's refusal to allow plaintiff to continue with the tests after only a little more than a third of the time specified in the contract had elapsed, all of which was duly pleaded. However, we shall consider the evidence in the first place from the point of view of the issue as thus stated by the learned court, namely, whether the proofs show that the machinery operated in accordance with the contract.

The main question to be considered in this connec-

tion is whether the gas produced by this machinery met the provisions of the contract with regard thereto. It is true as pointed out by the court in his opinion that at the beginning of the test Mr. Cox found that the lamp black produced by the ignition of the oil would pile up in the producer at the point where the gas passed from the horizontal washer to the vertical scrubber [p. 166]. This clogging was not, however, as significant as the court seems to think [pp. 300-301]. In the first place it was contemplated by the very contract provisions for a 90 days' test that there would be at first some things requiring adjustment, and accordingly changes were made by Mr. Cox which very quickly got rid of this trouble [pp. 165-8]. These changes and those necessitated by the unsteadiness of the firing and the blowing out of gaskets in the producers took about eight or ten days [p. 167]. Furthermore, this clogging of the lamp black was not, as stated by the court, in the defendant's gas pipes, but as specifically stated by Mr. Vorhees and corroborated by Mr. Cox, in the washers of the units [pp. 154, 166, 300]. This error of the court's is an important one, and it might well be that it had a determining effect in leading the court to direct a verdict for the defendant. For if the proof on this point had been as stated by the court it might well have the effect of an admission by the plaintiff that the gas produced by its machinery did at one time clog defendant's pipes. In view of the fact, very apparent from reading the opinion, that the court continuously overlooked that the plaintiff had a 90 days' test within

which to make adjustments and the further fact that the court held that the proof showed that the pipes would be clogged by the lamp black in the gas, the importance of this error is evident [pp. 302-3].

After Mr. Cox had made the changes the amount of lamp black in the gas was greatly reduced. While it was true that after the changes, there still existed some lamp black in the gas as it left the producer, nevertheless it had been reduced to a minimum and the gas was not only fitted for the purpose for which it was to be used, but it met the requirements of the contract [pp. 204, 266].

The court lays much stress in his opinion on the existence of this suspended matter [p. 301]. We respectfully submit that the learned court has failed to take several important facts into consideration. In the first place, the contract does not require that there should be *no* suspended matter in the gas when it reaches the engines it was to operate. The requirement merely was that there should be no suspended matter in the gas which *would be injurious to the engines or gas conducting pipes of the defendant* [p. 319]. Mr. Cox, whose qualifications as an expert were admitted by the defendant, testified that the small amount of suspended matter in this gas would have no injurious effects on the defendant's engines or pipes [pp. 204, 208]. The court, indeed, ruled that plaintiff could not show that in other plants under exactly similar conditions to the one in question the suspended matter in the gas had no injurious effect on the engines [pp. 208, 285-7]. However, Mr. Ensign, who invented this gas producer, tes-

tified that so far from having an injurious effect on the engines or pipes the suspended matter would be consumed as fuel and would add to the economy of the plant [p. 295]. There is nothing to contradict this evidence in the record.

The court, however, in his opinion lays great stress on the admission by Mr. Cox that the suspended matter in this gas *might* after a period cause the pipes to become clogged, unless they were sluiced or cleaned [pp. 204, 301]. Mr. Cox did not state what the period would be, but testified that the cleaning could be done without closing down the plant [p. 189]. Mr. Ensign corroborated this [p. 295]. MR. ENSIGN ALSO TESTIFIED THAT AT YUMA THE SAME KIND OF PRODUCERS UNDER SIMILAR CONDITIONS PRODUCED GAS WHICH CARRIED MORE LAMP BLACK BEFORE IT REACHED THE HOLDER THAN THE GAS PRODUCED BY THIS MORENCI PLANT, YET AFTER FOUR YEARS' RUN THE YUMA GAS DID NOT PRODUCE THREE INCHES OF LAMP BLACK IN THE BOTTOM OF THE HOLDER [p. 294].

It is to be remembered that one of the purposes of the holder was to allow the gas to come to a rest and the lamp black to settle out of the gas [pp. 237, 268]. The gas would, of course, not remain in the pipes any length of time. It is, therefore, obvious that it would be at least four years before there would be as much as three inches of lamp black in the bottom of the pipes. As the pipes were two feet in diameter, the likelihood of their being clogged with lamp black from this gas in any reasonable number of years is therefore very small [p. 226]. The plaintiff is clearly entitled to this deduction from the evidence.

“It is not a proper test of whether the court should direct a verdict that the court in weighing the evidence would, upon motion, grant a new trial. On the contrary it is the duty of a court when a motion is made to direct a verdict to take that view of the evidence most favorable to the party against whom it is desired that the verdict should be directed and from that evidence and the inferences reasonably and justifiably to be drawn therefrom determine whether or not under the law a verdict might be found for that party.”

Nelson v. Ohio Cultivator Company, 188 Fed. 620, 629.

It is obvious from a reading of the record that the clear inference from Mr. Cox's testimony was that the plaintiff had fulfilled all the requirements of the contract, but that if defendant wished to prevent any deposit at all in the pipes it could install a spraying or sluicing system to clean the pipes which could be operated without interrupting the operation of the gas plant [pp. 266-7]. Mr. Cox testified on cross examination: “No, I had not cleaned the gas so that it would not deposit in the pipes, it couldn't be done.”

“Q. With the apparatus you had there it couldn't be done? A. To clean it absolutely so that there would be no deposit in the pipes” [p. 265].

He also testified on cross examination: “My position was that I had made the proper kind of gas when I left Morenci, that I had made the kind of gas which I was required to make in accordance with the con-

tract when I left Morenci. *I was then merely offering to do something more than the contract required me to do*" [p. 266].

The fact that no sluicing apparatus was specified in the contract is of no significance in view of the testimony above referred to and the fact that the contract did not guarantee the non-existence of suspended matter in the gas. The part of the contract which is designated as the "Company Guarantee" governs on this question.

The learned court's erroneous conclusion that the contract provided that there should be no deposit in the pipes was evidently due to an inference made apparently at the suggestion of defendant's counsel from certain expressions contained in the "Manufacturer's Bulletin" attached to the contract [pp. 178-9]. This bulletin was *not* made a part of the contract. It is a printed document for general use and was not made expressly for this contract. The purpose of attaching this bulletin to the contract was very evidently because it contained cuts of the apparatus. This is clearly shown by the only reference made to the bulletin in the contract, namely, in the first part of the contract as follows:

"Three (3) two hundred (200) horse power, International Amet Crude Oil Gas Producers: lined complete with brick work and concrete, with all piping and valves as shown in cut on the first page of the "Company's Bulletin hereto attached;"

and in the typewritten part of the contract under the heading "Company's Guarantee:"

"That it shall be as described in the manufacturer's

“bulletin attached hereto, *or of the latest improved design.*”

These references to the bulletin for this specific purpose did not adopt all the provisions of the bulletin. By in effect, holding that the existence of suspended matter in the gas was obnoxious to a compliance with the contract the court made for the parties a different contract than they had made for themselves [pp. 302-3]. A mere reference for one purpose to another document does not adopt it for all purposes.

In the case of *Moreing v. Weber*, 3 Cal. App. 20, reference was made in a contract to certain specifications for the sole purpose of showing that the grading was to be completed “in accordance with the plans and specifications therefor.” The court in the above case, said:

“The rule seems so well established that it may be said to be elementary, that where in a contract reference is made to another writing for a particular specified purpose such other writing becomes a part of the contract for such specified purpose only and therefore this writing, known as the ‘specifications’ can serve no other purpose than to furnish the plans and specifications as to how the grading should be done and is foreign to the contract for the other purposes.”

The following authorities support this principle:

Noyes v. Butler Bros., 108 N.W. 839; 98 Minn. 448.

Knickerbocker L. Ins. Co. v. Heidel, 76 Tenn. (S. Lea) 488, 497;

Riley v. Brooklyn, 46 N. Y. 444;

B. & O. Rr. Co v. Stewart, 79 Md. 487; 29 Atl.
964;

Young v. Borzone, 66 P. 135, 138, 421
(Wash.);

Harvy v. Radkey, 1 White & W. Civ. Cas. Ct.
App. 277 (Tex.).

Moreover, the typewritten "Company Guarantee" must be held to control the provisions of the attached bulletin. This has been held even when the attached instrument was expressly made a part of the contract.

Daly v. Busk Tunnel Ry. Co., 129 Fed. 513,
518.

In the "Company Guarantee" it is stated: "There will be no suspended matter contained in the gas *which will be injurious to the engines or gas conducting pipes.*" As there is ample evidence in the record that the suspended matter existing in the gas produced by this apparatus would not injure the engines or pipes the burden of proof to show compliance with the guarantee in this respect has been fully met by the plaintiff. That the machinery would have failed to produce a result not required by the contract without further appliances has no bearing on the issue.

We respectfully submit that the evidence on this point of paramount importance—in fact the real issue of this case —was amply sufficient to require the submission of this case to the jury. The effect of the suspended matter in the gas upon the pipes and engines

was clearly a question of fact for the determination of the jury.

“The right of trial by jury is constitutional and is “not to be denied in an action at law where a material “question of fact remains in dispute. If there be substantial ground for doubt, the doubt should be resolved in favor of the right.”

Nyback v. Champagne Lumber Co., 90 Fed. 774, 776.

See also

Richardson v. Swift & Company, 96 Fed. 699.

The failure of the defendant to comply with its contractual undertaking to furnish a 15,000 cubic feet gas holder is relevant on this question. As has been already stated, the purposes of a holder are manifold. A 15,000 cubic feet holder would not only have equalized the pressure upon the mains, thoroughly mixed the components of the gas, acted as a storage tank and as a means of measuring the gas but it would also have permitted the suspended matter in the gas to settle out of it [pp. 143, 156, 206, 237, 293]. The defendant supplied the plaintiff with a holder of only 5,000 cubic feet capacity [pp. 235, 271-2]. The only purpose a holder of that size could be used for in connection with this plant, of all the purposes for which a holder is designed, was to measure the gas [p. 235].

If the plaintiff had been furnished with a 15,000 cubic feet holder which would have performed all the functions of a holder the gas in question would have been much cleaner [p. 266]. Mr. Vorhees testified

that the scrubber or washer doesn't clean the gas entirely; that part of that function is transferred to the holder [p. 156]. Mr. Cox testified that he had planned to clean the gas by means of the holder [pp. 265-6]. He added: "I have in other plants that had really more than there was in that one used a holder to take the soot out of the gas." Mr. Cox also testified that in the larger holder more of the suspended matter would have been dropped than in the small holder actually provided [p. 205]. It is true that Mr. Cox a little later testified that the difference would not be very great [p. 206]. This testimony must, however, be taken with Mr. Cox's statement that there was only a small amount of suspended matter in the gas [p. 204].

Mr. Ensign testified that the function of the holder was to allow the suspended matter to settle [p. 293]. Mr. Ensign also testified that while it would be very difficult to say just how much suspended matter the larger holder would have removed, yet it would have done so to a very considerable degree [p. 290].

The defendant, having broken the contract by failing to supply plaintiff with the large holder for the tests, which fact was duly pleaded, will not be allowed to claim that the result of its breach cannot be shown under the allegation of performance contained in this complaint. The authorities hold that the defendant is estopped from denying performance in the respects to which failure was due to its own breach of the contract.

The effects of this duly pleaded breach of the defendant must therefore be considered on this appeal.

Smith v. Wetmore, 167 New York 234, 239;

General El. Co. v. Nat. Contracting Co., 178
N. Y. 369, 375;

Sexton v. Richardson, 6 Cal. App. 459, 92 P.
395.

We submit, therefore, that a verdict for the plaintiff must have been sustained, even though a strict and literal performance of the contract as to suspended matter had not been shown, which we do not admit.

In any event, the above facts must be considered in view of the common count contained in the amended complaint.

Crane Elevator Co. v. Clark, 80 Fed. 705.

We have dwelt at length on this subject because the court's opinion makes it manifest that the existence of the suspended matter and need of a sluicing system in order to remove absolutely all deposits from the pipes was the determining factor of his decision [p. 303].

The court lays stress on the clause of the contract whereby the machinery was guaranteed to properly perform the duty for which it is known to be intended [p. 303.] We submit this intention must be gathered from the contract itself. This clause certainly cannot be construed, particularly without a word of evidence to that effect, to vary and contradict the specific and exact language of the contractual guarantee, which clearly contemplated the existence of suspended matter not injurious to the engine or pipes.

The court states in his opinion that the plaintiff has failed to prove that the gas met the guarantees apart from the question of the suspended matter, and he adds that none of the plaintiff's witnesses made any analysis of the gas [pp. 303-4]. Mr. Cox, whose qualifications as an expert were admitted, testified that he had made a practical test of the gas by means of a tell-tale or burner [pp. 200-1]. He testified that by means of this test it is possible to tell within 10% approximately what the value of the gas would be; that this is the test usually employed and that it was uncommon to test the gas by exact analysis [pp. 201-2]. Mr. Cox also testified that as there was provision for testing only one producer and owing to the small size of the temporary pipe line furnished by the defendant he was not able to test the three units together but only one at a time [pp. 168, 194]. This subjected the test to more adverse conditions than would have prevailed if the three units had worked together [p. 198]. The question as to the horsepower of the plant and the quality of the gas as shown by these tests was not withdrawn as stated by the court, but owing to the constant interruptions by defendant's counsel Mr. Cox was unable to answer the question categorically [pp. 193-202]. However, as the result of this test, Mr. Cox was able to testify that the gas met the requirements of the contract [p. 266]. He stated further that he was present when the chemist made an exact analysis of the gas and took down the figures of the test, but he was not allowed by the court to testify to these figures [pp. 252-3]. However, other admissions of the defendant as to the quality of this

gas are in the record. Mr. Vorhees testified that defendant's chemist said to him and Mr. Cox and Mr. Douglas, defendant's assistant consulting engineer, that this gas "was a very good power gas." Mr. Ensign testified that either Mr. Douglas or Mr. Le Grand, the defendant's consulting engineer, in discussing the gas in question, stated "that the gas produced * * * was of such a kind that it made an ideal gas engine fuel." Mr. Smith testified that the only objection to the gas made by the defendant was as to the suspended matter and not as to its quality [p. 281].

As to proof of the horsepower of the plant, plaintiff offered the testimony of Mr. Cox as to whether the plant performed the functions of three 200 horsepower Amet Crude Oil Gas Producers, but the court refused to admit this evidence [pp. 208-212].

Mr. Cox testified that about May 6, 1913, Mr. Thompson, who was defendant's general manager, stated to him that there was too much suspended matter in the gas and that the gas must be cleaned better than it was being done at that time. In reply Mr. Cox said that the pipes could be cleaned of all deposits without interruption of the service by installing a system of sprays or sluices, or if the defendant desired the gas to be cleaned absolutely, a rotary washer had lately been installed at a plant at El Centro which would do the work. Mr. Thompson stated he would send Mr. Douglas to El Centro to examine the rotary washer that was installed there and after hearing Mr. Douglas's report would then let plaintiff know whether he would be willing to grant the extension of time necessary to obtain this rotary washer. On this understanding Mr.

Cox left for Los Angeles on May 7, 1913, and held himself in readiness to return to Morenci to continue with the 90 days' trial of the apparatus [pp. 189, 240-2, 262-3, 263-4, 265, 266]. Plaintiff's position was that the gas fulfilled the requirements of the contract, but in order absolutely to satisfy defendant they were willing to do more than the contract required [p. 266].

Mr. Smith, plaintiff's president, testified that they held a man in readiness to continue with the tests as soon as they heard from Mr. Thompson [pp. 275, 280]. However, about May 27, 1913, Mr. Thompson wired plaintiff that defendant did not desire to continue with the contract, and followed this up with a letter to the same effect [p. 274]. About a week later Mr. Thompson had a talk with Mr. Smith in Los Angeles, at which he stated that defendant had made other arrangements and had no longer any use for plaintiff's apparatus [pp. 191-2, 275-6, 280]. This clearly constituted a breach of the contract on the part of defendant.

Plaintiff had been and was at this time ready and willing to continue with the tests. Mr. Cox and Mr. Ensign testified for themselves that they had made the gas as clean as they could with the apparatus then at hand [pp. 235, 292]. Mr. Smith, who was plaintiff's president, testified that the plaintiff was ready to continue the tests as soon as it heard from defendant, not necessarily with a rotary washer, but after making some changes or perhaps introducing some other apparatus [pp. 275, 280]. In contrast with defendant's refusal to go on with the contract, there is absolutely no evidence that the plaintiff did anything which could be construed as a breach of the contract.

But the court decided that it nowhere appears in the evidence that defendant prevented plaintiff's "engineer Cox from continuing the experiments or efforts to perfect the plant as installed or to put it in a suitable condition to meet the requirements of the guarantees" [p. 304]. This is clearly erroneous. In the first place there is the testimony just alluded to of Mr. Smith, who was in general charge of this matter, as to plaintiff's willingness and readiness to continue the test. Then, as has been already shown, the plant met the requirements of the guarantees. Also, the object of the 90 days' test clearly was to enable the plaintiff to make any changes or additions to the machinery it might choose. The plaintiff was not confined to experiments with the plant as installed, as the court evidently thought. Moreover, the contract provides that the machinery "shall be as described in the manufacturer's bulletin *or of the latest improved design.*" Finally the evidence above referred to shows that plaintiff was induced to lie in wait till defendant had decided with regard to the rotary washer until about May 28, and that then, instead of being allowed to continue the tests as Mr. Smith testified it was ready to do apart from all question of the rotary washer, it was informed by defendant that they had no further use for the apparatus and had made other arrangements. We submit, therefore, that the court's decision that it nowhere appears in the evidence that the plaintiff was prevented from continuing the tests was certainly not warranted by the evidence.

"The parties to an executory contract have a right "to something more than that it shall be performed

“when the time arrives; they have a right to the maintenance of the contractual relation up to that time as well as to the performance of the contract when due, and by weight of authority, if one of the parties renounce it before that time, the other is entitled to sue at once for the breach. In the leading English case the court based the doctrine on the ground that where there is a contract to do an act on a future day there is a relation constituted between the parties in the meantime by the contract and they impliedly promise that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation.”

9 Cyc. 635, 636.

There can be no question, therefore, that the court erred in directing a verdict. The plaintiff clearly proved that the machinery met the guarantees of the contract. The court's decision that the defendant had the right to decline to proceed under the contract before the expiration of the 90 days' trial is obviously erroneous in view of the above facts [p. 304]. This decision also clearly involved other issues of fact which should have likewise been left to the jury, namely, whether plaintiff abandoned the contract or would have been unable to perform it.

The right to a jury trial being a constitutional one, it is not to be denied except in a clear case. Moreover, upon a motion for a verdict, the view of the evidence most favorable to the party against whom the instruction was asked is to be taken. The plaintiff in this case should have been given the benefit of all the inferences reasonably and justifiably to be drawn from the evi-

dence. The above review of the evidence conclusively shows that so far from this being done the plaintiff was denied the clear effect of the evidence.

In the cast of Mount Adams E. P. Inclined Ry. Co. v. Lowery, 74 Fed. 463, Justice Lurton, in delivering the opinion of the court, after an exhaustive review of the leading cases on the subject of a directed verdict, comes to the following conclusion:

“We do not think, therefore, that it is a proper test
“of whether the court should direct a verdict that the
“court, on weighing the evidence, would, upon motion,
“grant a new trial. * * * In passing upon such
“motions he is necessarily required to weigh the evi-
“dence that he may determine whether the verdict was
“one which might reasonably have been reached, but
“in passing upon a motion to direct a verdict his func-
“tions are altogether different. In the latter case
“we think he cannot properly undertake to weigh the
“evidence. His duty is to take that view of the evi-
“dence most favorable to the party against whom it is
“moved to direct a verdict, and from that evidence,
“and the inferences reasonably and justifiably to be
“drawn therefrom, determine whether or not under law
“a verdict might be found for the party having the
“onus.”

To the same effect is the following excerpt from the opinion of the court in *Estate of Arnold*, 147 Cal. 586:

“Every favorable inference fairly deducible and
“every favorable presumption fairly arising from the
“evidence produced must be considered as facts proved

“in favor of contestant. Where evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the contestant. If there be any substantial evidence tending to prove in favor of contestant on the facts necessary to make out their case they are entitled to have the case go to the jury for a verdict on the merits.”

In the case of *Goldstein v. Merchants Exchange & Cold Storage Company*, 123 Cal. 625, the court said:

“A non-suit should be denied where the evidence and the presumptions reasonably arising therefrom are legally sufficient to prove the material allegations of the complaint.”

In *Zillner v. Gerichten*, 111 Cal. 73, is found the following:

“A non-suit should be denied when there is any evidence to sustain plaintiff’s case without passing upon the question as to the sufficiency of such evidence.”

The opinion of the court in the case of *Larsen v. Larsen*, 15 Cal. App. 532, is, in part, as follows:

“A motion for a non-suit admits the truth of all evidence in favor of the plaintiff, together with every inference or presumption legitimately deducible therefrom. Contradictory evidence must be disregarded, and upon such a motion all evidence must be construed most strongly against the defendant.”

In *Burr v. United Railroads*, 163 Cal. 663, the court said:

“It is elementary that a motion for non-suit is not

“to be granted where there is any substantial evidence which, with the aid of all legitimate inferences favorable to the plaintiff, would support a verdict or finding that the material allegations of the complaint are true.”

To the same effect are the following cases:

- S. R. R. Co. v. Gadd, 207 Fed. 277;
- Erie R. R. Co. v. Weber, 207 Fed. 293;
- Tenn. Copper Co. v. Gaddy, 207 Fed. 297;
- Worthington v. Elmer, 207 Fed. 306;
- Liberty Bell Gold Mining Co. v. Smuggler
Union Mining Co., 203 Fed. 795;
- Bolton-Pratt Co. v. Chester, 210 Fed. 253;
- Smith v. Baltimore & Ohio R. R. Co., 210 Fed.
414;
- Hails v. Michigan Central R. R. Co., 200 Fed.
533;
- Shank v. Great Shoshone & Twin Falls Water
& Power Co., 205 Fed. 833;
- Cascade Foundry Co. v. L. J. Mueller Furnace
Co., 140 Fed. 791;
- Nelson v. Ohio Cultivator Co., 188 Fed. 620,
629;
- Phoenix Assur. Co. v. Lusker, 77 Fed. 243;
- Travellers Ins. Co. v. Randolph, 78 Fed. 754;
- Texas Pacific Ry. Co. v. Cox, 36 L. Ed. 829;
- Balzer v. Warring, 95 N. E. 257, 261 (Ind.);
- Ardison v. Illinois Central R. R. Co., 249 Ill.
300, 302;
- Hobbs v. Ray, 96 S. W. 589 (Ky.);
- McLean v. Dow, 125 Ill. App. 174, 177;

Lorne v. Yeoman, 125 Ill. App. 406;
Kimball Co. v. Crinckshank, 123 Ill. App. 580;
Skud v. Tellinghast, 195 F. 1, 6.

Moreover, the court fell into error in deciding that the plaintiff had to prove upon the trial that the machinery met each and all of the guarantees specified in the agreement [p. 299]. We have seen that the defendant's failure to provide plaintiff with a large holder affected the amount of suspended matter in this gas, and that defendant is estopped from denying performance of the contract in this respect; though, we submit, performance was in any event amply shown. Likewise, as to the guarantees of quality and quantity of the gas, which were the only other points that the court held had not been sufficiently covered by proof [pp. 303-304]. It was duly pleaded and the evidence was undisputed that defendant refused to permit plaintiff to proceed with the test long before the expiration of the period of ninety days. We submit that in view of this end and the evidence above referred to amply showing, at the very least, substantial performance, defendant is estopped from requiring a literal and absolutely exact proof of performance in every particular.

Smith v. Wetmore, 167 New York 234, 239;
General Elec. Co. v. National Contracting Co.,
178 New York 369, 375;
Sexton v. Richardson, 6 Cal. App. 459, 92 Pac.
395.

In view of the proof we submit that the court should have allowed this case to go on. Under the strictest

interpretation of the effect of the evidence produced the plaintiff proved substantial performance of the contract. Under the circumstances of this case as set forth in the proof the doctrine of substantial performance applies. The jury should have been allowed to decide whether there was substantial performance. Substantial performance is performance and entitles the plaintiff to recover under a complaint alleging performance.

“The jury having found that the plaintiff did his
“work substantially according to the contract, a suffi-
“cient compliance therewith on his part was compe-
“tently ascertained. ‘The rule is that a substantial per-
“formance must be established to entitle the party
“claiming the benefit to recover, but this does not
“mean a literal compliance as to all details.’ Desmond-
“Dunne Co. v. Friedman-Doscher Co., 162 N. Y. 486,
“56 N. E. 995; McCartan v. Inhabitants of Trenton,
“57 N. J. Eq. 571, 41 Atl. 830. ‘Whether * * *
“alleged defects are substantial or unimportant is a
“question of fact for the jury. Substantial perform-
“ance of the entire contract is sufficient and the jury
“may properly so find.’ Pitcarn v. Phillips-Hiss Co.,
“113 Fed. 483.”

City of Elizabeth v. Fitzgerald, 114 Fed. 547,
549.

See also

Springfield Milling Co. v. Barnard & L. Mfg.
Co., 81 Fed. 261, 266;

Pitcarn v. Philip Hiss Co., 113 Fed. 492, 496-
497;

Thomson-Houston Elec. Co. v. Brush-Swann
E. L. & P. Co., 31 Fed. 535;

Rowe v. Gerry, 112 App. Div. 368, affirmed 188
N. Y. 625;

Omaha Water Co. v. Stewart, 206 Fed. 448,
449;

Blakely v. J. Neils Lumber, 141 N. W. 179, 180
(Minn.);

Chambers v. Jaynes, 4 Pa. St. 39.

II.

The Court Erred in His Rulings in Admitting and Excluding Evidence.

We respectfully submit that the court committed numerous errors in the admission and exclusion of evidence at the trial which were seriously prejudicial to the plaintiff, and which require the reversal of the judgment.

A. EXCLUSION OF EVIDENCE AS TO SIMILAR PLANTS. (Assignment of Errors, Error I.)

The contractual guarantee relating to suspended matter in the gas was not that there would be none, but that it would not be injurious to the defendant's engines and pipes [p. 319]. It was obviously, therefore, of the first importance that the plaintiff prove that the suspended matter in the gas generated in the plant at Morenci was not injurious to the engines and pipes of defendant. Plaintiff endeavored to do this by eliciting testimony from its witnesses Cox and Ensign that "the gas produced by other plants

exactly similar to the plant in question operating under the same conditions and producing similar gas did not act upon the pipes and engines connected therewith in a manner injurious to them” [pp. 53-61, 159-162, 207-8, 284-9]. The court sustained the objections of the defendant to this evidence and excluded it. This was clearly error.

Wigmore on Evidence, 451, says:

“In this way may be evidenced * * * the tendency or quality of tools, weapons, vehicles, acids and other materials, as indicated in their effects upon similar substances under similar conditions; and of the tendency of a machine or apparatus, as shown by other instances of its operation under similar circumstances, to operate defectively or otherwise (for instance, in actions for breach of warranty or personal injury); here the working of other similar machinery (tools or apparatus) would equally be receivable, provided the conditions were similar and a confusion of issues were not involved.”

Avery v. Burrall, 77 N. W. 272;

Indiana N. & I. G. Co. v. Anthony, 58 N. E. 868, 872;

Delaney v. Framingham G. F. & P. Co., 88 N. E. 773, 775, 202 Mass. 359;

Davis v. Oakland Chem. Co., 121 Ap. Div. 242 (N. Y.).

B. EXCLUSION OF EXPERT EVIDENCE OF PERFORMANCE. (Assignment of Errors, Error II.)

Witness Cox was plaintiff's salesman engineer and conducted the tests on behalf of plaintiff and operated the apparatus [pp. 159-160]. His testimony shows that his knowledge of this plant was intimate and extensive. Moreover, his qualifications as an expert were admitted by defendant [pp. 163, 206]. The contract stated that the plaintiff would furnish defendant with three 200-horsepower International Amet Crude Oil Gas Producers [p. 317]. In order to prove performance of the contract in this respect plaintiff asked Mr. Cox whether the apparatus as installed properly performed the functions of a three 200-horsepower International Amet Crude Oil Gas Producer. The court sustained defendant's objection to this evidence and excluded it [pp. 62-64, 209-212]. This, we submit, was error. Particularly is this true in view of the contractual provision: "It is understood and agreed that any machine the company may furnish is properly to perform the duty for which it is known to be intended by the parties." Obviously this intention must be ascertained from the contract. If, therefore, plaintiff was to furnish three such producers it must have been intended that they perform the functions of such producers, and Mr. Cox was qualified to prove this. Defendant's contention that this was one of the questions for the jury

and therefore not a proper subject for expert evidence, has no weight.

Western C. & M. Co. v. Barberich, 94 Fed. 329,

331-333;

St. Louis I. M. & S. Ry. Co. v. Edwards, 78

Fed. 745, 746;

Sheldon v. Booth, 50 Iowa 209;

Ward v. Kilpatrick, 85 N. Y. 413, 416;

Hood v. Diston, 90 Ala. 377, 7 Sout. 782.

C. EXCLUSION OF EVIDENCE OF CIRCUMSTANCES EXISTING AT THE TIME DEFENDANT REFUSED TO GO ON WITH THE CONTRACT AND OF PERFORMANCE. (Assignment of Errors, Error III.)

The plaintiff offered the testimony of its witness Cox to show the circumstances attending his leaving Morenci about May 7, 1913. For this purpose plaintiff's counsel propounded a question to this witness regarding a conversation had by him and Mr. Ensign with defendant's consulting and assistant consulting engineers [pp. 169-185]. The object of this evidence, as shown by the long colloquy between counsel of the parties and the court in the absence of the jury, was to show that while plaintiff had fully performed the contract it was endeavoring to satisfy the defendant even beyond the contractual requirements [pp. 169-185]. More specifically it was to show that on being told that there was too much foreign matter in the gas by defendant's engineers, Mr. Cox replied that a rotary washer like the one installed at El Centro would clean the gas absolutely. The engineer agreed to take this up with Mr. Thompson, defendant's general manager.

Mr. Thompson next day agreed with Mr. Cox that he would send an engineer to El Centro to examine the work of the rotary washer and if his report was favorable, defendant would grant such extension of the 90 days' test as might be necessary for the installation of this apparatus at Morenci. As defendant's amended answer put in issue the question whether plaintiff had performed or had abandoned this contract, this proof tending to show that plaintiff did not abandon the contract but had made arrangements to return and continue the tests is extremely important, and the court's exclusion of it was prejudicial error [pp. 66, 77, 169-185].

We submit, moreover, with regard to the long colloquy held by counsel and the court in the absence of the jury, that the plaintiff was at least entitled to have the evidence then adduced and discussed and the inference deducible from it weighed and considered by the jury and not by the court.

Error was also committed by the court in striking out on defendant's motion Mr. Cox's testimony that he left Morenci to await the result of the inspection of the El Centro plant by the representatives of both companies [pp. 77-8, 97-8]. The court also erred similarly in excluding so much of Mr. Cox's conversation with Mr. Thompson as related to the rotary washer and the proposed extension of time [pp. 167-173, 186-193]. We submit that plaintiff could not be required to rest its case with the bare testimony that Mr. Cox left Morenci without showing why he left, in view of the issues raised by the pleadings. There is no question here of

a modification of the contract. All this evidence should have been admitted.

Chapman v. Kansas City C. & S. Ry. Co., 146 Mo. 481, 48 S. W. 646;

Rogers B. & Co. v. Hart, 106 Ill. App. 393;

Texas S. F. & N. Ry. Co. v. Saxton, 7 N. M. 302, 306, 34 Pac. 532;

Raven v. Smith, 87 Hun. 90, 92, 94 Sup. Ct. Rep. N. Y. 90, 92.

D. EXCLUSION OF EVIDENCE RELATING TO THE TEST.
(Assignment of Errors, Error IV.)

The court excluded the testimony of Mr. Cox relating to statements made by Dr. Sanberg, defendant's chief chemist, as to the result of tests made by him of the gas in question. Defendant's general manager advised Mr. Cox that Dr. Sanberg was there for the purpose of making the tests. Dr. Sanberg's statement would therefore have been an admission binding on defendant. The court erred in excluding this evidence [pp. 202-3]. The court also erred for a similar reason in excluding Mr. Cox's evidence as to the figures of the test he saw Dr. Sanberg write down [pp. 252-3]. These admissions would have tended to prove performance of the guarantees as to the quality of the gas by the appellant, and exclusion of them is therefore prejudicial error.

Rahm v. Deig, 121 Ind. 283, 289, 23 N. E. 141;
McPherrin v. Jennings, 66 Ia. 622.

Plaintiff offered to prove by witness Cox that it was unable to make a test of the gas in exactly the manner

provided for by the contract because of defendant's failure to furnish the 15,000 cubic feet gas holder provided for by the contract. Plaintiff then offered to prove what tests were made, and how the witness determined that the gas was of the quality required by the contract, and also the difference in the consistency of the quality of the gas after passing through the 5000 cubic feet holder and the 15,000 cubic feet holder. Mr. Cox's qualifications to answer such questions were admitted. Yet the court excluded all this evidence [pp. 194-198, 203, 86-90]. This, we submit, was error. It is difficult to see how plaintiff could be expected to prove its case without eliciting testimony of this nature. At paragraph V of the complaint the defendant's failure, in violation of the contract, to supply a holder large enough for any other purpose than measuring the gas was duly pleaded. The defendant is, therefore, estopped from requiring a full and exact proof of performance of the contract in the respects affected by its own failure to comply with the contract. We submit consequently that plaintiff is entitled to show just what effect defendant's breach of the contract had.

Smith v. Wetmore, 167 New York 234, 239;

General Elec. Co. v. National Contracting Co.,
178 N. Y. 369, 375;

Sexton v. Richardson, 6 Cal. App. 459, 92 Pac.
395.

Moreover, we submit in any event that plaintiff was entitled to show the changes necessitated in the test by reason of defendant's breach of its undertaking to supply a large gas holder.

Hubbard v. Chapman, 54 N. Y. Suppl. 527, 531.

E. EXCLUSION OF EVIDENCE AS TO EFFECT OF SUSPENDED MATTER. (Assignment of Errors, Error V.)

Plaintiff proposed to show by expert testimony that the deposits in the pipes from the suspended matter in the gas could be removed by ordinary cleaning of the pipes. The defendant objected that the contract did not provide that there should be any sluicing of the pipes. The court sustained the objection and excluded this evidence. We respectfully submit that this was error because the guarantees of the contract, which govern on this point, clearly contemplated the existence of suspended matter, and the contract itself did not purport to cover anything but the gas plant [p. 91]. Therefore, the fact that cleaning of the pipes was not specified is of no significance.

F. ERRONEOUS ADMISSIONS OF EVIDENCE AS TO INTENTION OF THE PARTIES. (Assignment of Errors, Error VI.)

The defendant propounded to plaintiff's witness Cox a long series of questions relating to the purpose for which the parties intended this gas plant. As the basis of this testimony as to intention, Mr. Cox was first required to testify to the physical conditions near the gas plant [pp. 92-95, 213-14]. Then evidence was evoked that the gas made by the defendant's existing plant at that time was made from coal, and that it was hoped by plaintiff that if the plant in question in this action was a success it would be enlarged and would supplant the defendant's then existing plant [pp. 95-98, 214-218].

The court then excluded evidence of a letter written to plaintiff by defendant's general manager, dated November 25th, 1912, which defendant claimed showed the purpose of the installation [pp. 219-220]. The court also struck out a question based in terms upon that letter and the answer evoked thereby, after having first admitted it [pp. 219-223]. These last two rulings were obviously correct, for the contract sued upon is a written contract and as it clearly set forth its object and purposes it can alone be referred to.

However, immediately afterwards the court admitted testimony of Mr. Cox to the effect that the object of the installation of this plant was to produce gas of a commercial value to operate the concentrator mining machinery of defendant *with greater economy than was possible with gas made from coal* [pp. 223-4].

All these questions and evidence were objected to by plaintiff on the grounds that they were not proper cross-examination, were wholly immaterial and incompetent, that they tended to vary and contradict the terms of a written contract in evidence in the case, the object and purposes of which were clearly set forth therein and which contained no reference to the matters thus testified to [pp. 214-25] . It was error to admit this evidence.

The fact that plaintiff on direct examination elicited from Mr. Cox testimony that the functions the parties intended this apparatus to perform were to manufacture gas to operate certain engines and a concentrator near the gas plant, does not affect the obvious error of these rulings of the court. The contract guaranteed that this machinery would "properly perform the duty for which

it is known to be intended by the parties.” Plaintiff’s position is that the intention of the parties is to be ascertained from the contract. The court, however, would not permit plaintiff to ask Mr. Cox questions relating to the functions of the apparatus based on clauses of the contract. It was not till then that plaintiff entered into the question of the intention of the parties. We submit that this did not open the way to defendant to add to this written contract guarantees and provisions it does not contain.

Again, defendant was permitted to cross-examine Mr. Cox as to the probable effect on the existing gas plant of permitting plaintiff to use the 15,000 cubic feet gas holder for its tests. The purpose of this cross-examination was avowedly to show that if the then existing 15,000 cubic feet gas holder had been turned over to the plaintiff for the tests it would have resulted in the shutting down of the operations of the defendant. In view of the specific contractual obligation on the part of the defendant to furnish a 15,000 cubic feet holder, and the provision that the samples of gas for the test were to be taken from the main after leaving the holder—the holder described in the contract being obviously the one referred to—the irrelevancy of this testimony is apparent [pp. 228-231]. The difficulty defendant would have had to comply with its contractual obligation is immaterial. Parties can make binding obligations to do what turns out to be difficult, troublesome or expensive.

Wald’s *Pollock on Contracts* (3d Am. Ed.) 522.

G. ERRONEOUS ADMISSIONS OF CONVERSATIONS OF MR. COX WITH DEFENDANT'S EMPLOYEES. (Assignment of Errors, Errors VI and VII.)

The court allowed defendant to ask Mr. Cox on cross-examination concerning conversations had by him with two of defendant's engineers [p. 233]. The purpose of this evidence, as shown by the statement of defendant's counsel, was to show an admission binding on the plaintiff [p. 230]. As Mr. Cox was merely plaintiff's sales engineer and had not sufficient authority to bind plaintiff, the court admitted this evidence only as going to the witness' credibility [p. 234]. As, however, this conversation had not been referred to on direct examination and no foundation for its admission as impeaching the witness had been laid, we submit the ruling was erroneous.

For the same reason the court erred in permitting defendant's counsel to question Mr. Cox as to an alleged statement of his that the small holder would be satisfactory [pp. 237-8].

The defendant was also allowed to ask Mr. Cox with regard to his conversation with Mr. Thompson about the installation of a rotary washer [p. 240]. This was obviously not proper cross-examination as the plaintiff's questions as to this very conversation had been excluded on the direct examination of this witness [pp. 187-189].

"The rule has long been settled that the cross-examination of a witness must be limited to the matters stated in his direct examination. If the diverse party desires to examine him as to other matters he must

“do so by calling the witness to the stand in the subsequent process of the cause. *Phil. & T. Rr. Co. v. Stimpson*, 14 Pit. 461; *Greenleaf Evidence* 445.”

Houghton v. Jones, 1 Wall. 702, 706.

See also

Philadelphia & T. Rr. Co. v. Thompson, 14 Pct. 448.

Similar error was committed by the court with regard to defendant's exhibit 6 and the cross-examination of Mr. Cox thereon. This letter was written by Mr. Cox to the defendant and related to the proposed installation of a rotary washer. The plaintiff had not been allowed to examine Mr. Cox with regard to this matter [pp. 98-100]; clearly, therefore, this letter was inadmissible as improper cross-examination, for the witness could not be contradicted on a matter he did not testify to. The record shows that this letter was admitted for the purpose of going to the witness' credibility [p. 245]. We submit this was error as there was no proper foundation laid for the impeachment of the witness, and it was not offered for that purpose. However, the court stated that he had not admitted this letter. At all events the court allowed defendant to ask Mr. Cox questions which were really, and were stated to be, lengthy extracts from this letter [pp. 246-250]. This procedure was not only erroneous for the above reasons, but also for the reason that these questions were based avowedly on a letter not in evidence.

The same error was committed by the court in admitting the conversations of Mr. Cox with Mr. Le

Grand and Mr. Thomson [pp. 249-251]. We submit the defendant will not be allowed to test the witness' credibility by asking him questions as to matters ruled out on direct examination and without laying any foundation. This witness was the defendant's witness as to these matters.

H. ERRONEOUS ADMISSION OF EVIDENCE REGARDING THE GAS HOLDERS. (Assignment of Errors, Error VI.)

The defendant was allowed to ask Mr. Cox on cross-examination whether in his opinion a 15,000 cubic feet holder was required by this plant. In view of the specific contractual obligation on the part of defendant to furnish a holder of that size the admission of this testimony was clearly erroneous [pp. 267-8, 112-13]. In the same way the court erred in permitting defendant to ask this witness as to his opinion regarding the sufficiency of the storage capacity of the larger holder [p. 268]. Mr. Cox's opinion on this subject was without relevancy.

Crane Co. v. Columbus Const. Co., 73 Fed. 984, 989.

The court also erred in permitting the cross-examination of Mr. Cox as to the contents of the manufacturer's bulletin [pp. 269-270]. The purpose of this cross-examination was evidently to attempt to minimize the importance of the 15,000 cubic feet holder. We submit, however, that the typewritten part of the contract designated "guarantee" must control the manufacturer's bulletin, as shown above.

Daly v. Busk Tunnel Ry. Co., 129 Fed. 513, 518.

The court's admission of the evidence as to the reason why the size of the holder was fixed at 15,000 cubic feet was also error. The reason was, of course, immaterial in view of the contractual provision.

I. ERRONEOUS EXCLUSION OF TESTIMONY AS TO THE LIMITS OF MR. COX'S AUTHORITY. (Assignment of Errors, Error VIII.)

The plaintiff's counsel endeavored to elicit from Mr. Smith, who was plaintiff's president, testimony with regard to the exact nature of Mr. Cox's employment and the limits of his authority to represent plaintiff. This evidence was excluded [pp. 276-277]. In view of defendant's attempt to show that Mr. Cox was in all things the representative of the plaintiff and that his statements were binding as admissions on plaintiff, the relevancy of this evidence is clear.

Lyons v. Thompson, 16 Iowa 62;

31 Cyc. 1658.

Under this point we have discussed errors I to VIII, set forth in the assignment of errors. These errors relate to the admission and exclusion of evidence. We strongly submit that these errors were seriously prejudicial to the plaintiff and greatly hampered it in proving its case.

III.

The Court Erred in Excluding Testimony Offered to Prove the Second Cause of Action for Goods, Wares and Merchandise Sold and Delivered.

(Assignment of Errors, Error IX.)

The plaintiff endeavored to elicit from its witnesses Cox and Smith evidence in proof of the second cause of action contained in the complaint for goods, wares and merchandise sold and delivered. The court excluded this evidence [pp. 127-128, 259-261, 273-4]. This we submit was error, as shown by the authorities.

In *Katz v. Bedford*, 77 Cal. 319, 19 Pac. 523, the plaintiff had counted upon a written contract and the common count and it was held that he could recover on the latter.

In *Cowan v. Abbott*, 92 Cal. 100, 28 Pac. 213, it was held that a plaintiff could join a count upon an express contract and a count upon a *quantum meruit*, and will not be required to elect between them.

Wilson v. Smith, 61 Cal. 209;

Hunter v. Vicario, 146 App. Div. (N. Y.)
93, 97;

Intendant v. Pippin, 31 Ala. 542;

City of St. Charles v. Stookey, 154 Fed. 772,
776.

That these authorities are binding on this case brought in the District Court of Arizona appears from the case of *Pringle v. Hall*, 6 Ariz. 284, where it was held that the Arizona Code of Procedure not only per-

mitted but encouraged the combination of actions arising out of the same transaction.

It appears fully from the record that plaintiff substantially performed at the very least. The defendant, on the other hand, broke the contract in three respects: namely, in failing to provide plaintiff with a large gas holder to conduct the tests, in refusing to go on with the tests when a little over a third of the time provided by the contract had expired and in not paying for the apparatus. Under these circumstances it is submitted that the above authorities control this case, and that the court in limiting plaintiff to the first count on the express contract fell into error.

IV.

The Motion for a New Trial Should Have Been Granted.

The plaintiff made a motion for a new trial for all the reasons set forth in the assignment of errors and discussed above. The court denied the motion. This was error. (Assignment of Errors, Error XVI.)

We submit that the record shows that there was ample evidence which required the submission of the case to the jury, and the evidence received was sufficient to support a verdict for the plaintiff rendered upon it. It would have been reversible error to set aside such a verdict.

We regard it, moreover, as beyond dispute that much evidence of a competent and material character was erroneously excluded by the court, which if admitted would have established even more clearly the plaintiff's plain right to have this case considered and deter-

mined by the jury. In effect the learned court first refused to receive the competent evidence of the plaintiff and then determined adversely to it the questions and inferences of fact clearly presented by the evidence which remained, and dismissed the plaintiff for an alleged failure of proof. If this failure existed at all, which we deny, it resulted only from the erroneous rulings of the learned court and from his unauthorized assumption and exercise of the functions of the jury.

We think it clear that reversal must follow and we respectfully pray that the judgment be reversed with costs, and that a new trial be granted.

Respectfully submitted,

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*Attorneys for Plaintiff, with Whom John de R. Storey
Was on the Brief.*

San Francisco, Cal., October 21st, 1914.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Smith-Booth-Usher Company,	}
<i>Plaintiff in Error,</i>	
<i>vs.</i>	
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BRIEF ON BEHALF OF THE DEFENDANT IN ERROR

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Attorneys for Defendant in Error

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BRIEF OF DEFENDANT IN ERROR

Before entering upon a consideration of the cause, we gladly take occasion to express our cordial acknowledgement of the courtesy extended us by counsel for Plaintiff in Error in the preliminary submission of their brief herein, which has accorded us a period most generous and extensive for its perusal.

SUPPLEMENTAL STATEMENT OF CASE

In order to get this case fairly to the attention of the Court, and exhibit clearly the way in which the alleged errors arose, we think a supplemental statement of the case proper.

The contract sued on was dated December 5, 1912. It provided for shipment of the gas producer within forty five

NOTE: The transcript of record is herein referred to as "Tr." giving page number.
Plaintiff's brief is referred to as "P. B."

(45) days (Tr. 6). Time was of the essence of the contract (Tr. 10). Shipment was made in about ninety (90) days (Tr. 16). The purchaser agreed to erect the apparatus on arrival, in accordance with the plans and specifications of the seller (Tr. 9). In pursuance of its option in that respect the seller furnished a different scrubber from that specified, but of the latest approved design (Tr. 155). Prior to that time, Plaintiff had sold four of these plants (R. 273, 279).

Installation was complete when Plaintiff's expert witness J. H. Cox reached Morenci about April 2, (Tr. 166, 167) in accordance with Plaintiff's plans and specifications (Tr. 185). It had been erected under the supervision of Plaintiff's witness, Lawrence Vorhees who left Los Angeles March 8, and was able to start the plant March 27th or 28th (Tr. 152). He had never before erected a scrubber of the character substituted by Plaintiff (Tr. 155). When he had the plant in operation he turned the gas into the holder and mains of Defendant, but turned it out because the producers would not clean the gas sufficiently (Tr. 154). He remained about seven weeks, leaving in the latter part of April, being succeeded by Mr. Cox (Tr. 154). Vorhees did not put the plant in operation, or turn it over to Defendant complete and operating (Tr. 155). But he could not see that any changes were necessary (Tr. 157).

When Mr. Cox reached Morenci April 2, the plant was not in operation (Tr. 167). He started it up but had difficulties which required him to spend eight or ten days in making various changes (Tr. 167). When these were completed during the last week of April (Tr. 167) he again attempted to operate the plant, when the gaskets between each washer and producer blew out. He then had to remove all the producers from the washers, in other words, to dismantle part of the plant (Tr. 167, 228). He did not there-

after operate the three producers simultaneously but did operate them one at a time. (Tr. 168). He left Morenci May 7, after which time no attempt was made by any one to operate the plant. The longest continuous operation of the plant during April was for twenty-four hours, each unit separately (Tr. 227). His last adjustments of the plant were completed April 25 or 26.

Meanwhile, Plaintiff had called in O. H. Ensign, the inventor of this gas producer, to advise on whatever problem had arisen (Tr. 291). He recommended the substitution of a centrifugal scrubber (Tr. 293) of a type which had not been successfully demonstrated when this contract was made (Tr. 292).

Plaintiff thereupon through Mr. Cox, asked for an extension of time (Pl. Br. p. 23). That was on May 6, five months after the contract was made. Cox was sure they could be shipped from the factory in seven or eight weeks and allowed another four weeks for the arrival of the new scrubber. (Tr. 263). Smith thought it could arrive in from eight to ten weeks, (Tr. 281) not more than ninety days at the outside. Cox had then made the gas as clean as he could with the apparatus then installed. He thought it could be used in Defendant's long pipe lines, by introducing a system of sprays and sluicing not provided by the contract or contemplated by it (Tr. 264).

Mr. Thomson, Defendant's general manager, said he would investigate the proposed new scrubber and advise whether or not Plaintiff would be given further time in which to install it. (Tr. 263). About May 27, Defendant wired Plaintiff it would go no further with the matter, in other words, that the extension of time would not be granted (Tr. 274). Cox says Defendant did not promise to install the new scrubber. (Tr. 264). Smith says the same (Tr. 281).

In view of this, it is wholly incomprehensible that Plaintiff should now claim it "was induced to lie idle" while Defendant was investigating the new scrubber (P. B. 18), or that Plaintiff should represent itself as aggrieved by Defendant's refusal to grant the desired extension.

Plaintiff states that Cox left Morenci, with Defendant's consent, "pending the purchase of a new washer with the intention of returning and continuing the tests on behalf of the Plaintiff" (P. B. 5). But Cox distinctly states the contrary saying "As far as the cleanness of the gas was concerned, I didn't expect to go back there and try to make any cleaner gas with that machinery than I had already made." (Tr. 264). Plaintiff repeatedly urges in its brief, that Defendant's refusal to install the proposed new scrubber was responsible for its inability to show that aside from the suspended matter in the gas it otherwise met the specific guarantees of the contract. This is oddly inconsistent with its specific allegation that prior to May 6, 1913, a trial run of the machinery was had and "that upon the said trial the said machinery met each and all of the guarantees specified in the said agreement," and that it performed "all of the terms and conditions of the said agreement" excepting as to time of shipment from Los Angeles, which latter default it is alleged and admitted was waived by Defendant. (Tr. 17).

Moreover, although it is alleged that Plaintiff was ready and willing to proceed with the contract (of which it claims full performance) after Defendant's alleged abandonment thereof, by refusing the requested extension of time (Tr. 17) there is not a line or syllable of evidence in the record which remotely suggests that Plaintiff ever offered to proceed any farther with the installation already made, or asked or was denied permission so to do, or which in any respect controverts the finding of the trial court:

“It nowhere appears in the evidence that defendant prevented the plaintiff or its engineer, Cox, from continuing the experiments or efforts to perfect the plant as installed or to put it in a suitable condition to meet the requirements of the guarantees.” (Tr. 304).

The principal point made by Plaintiff has to do with the gas holder. The contract specified that Defendant should furnish among other things a 15,000 ft. gas holder (Tr. 8). Plaintiffs' specifications showed no connection with the gas holder. (Tr. 271). Defendant was required to and did erect the plant according to these specifications under Plaintiffs' supervision. Yet it is now urged that Plaintiff was wholly disabled to test the gas because the plant was not connected with the 15,000 foot gas holder. Let it be noted in relation to this holder that a 15,000 foot holder was specified because it happened to be there when Plaintiff was negotiating for the sale of this plant. (Tr. 270). The manufacturers' bulletin which Plaintiff alleges was part of the contract (Tr. 5-15) and which Plaintiff introduced in evidence as part of the contract (Tr. 139, 317, 327), but which Plaintiff now says was not a part of the contract, (P. B. 16) states that “a small gas holder” is a necessary auxiliary to the gas plant (Tr. 12).

Although Plaintiff alleges full performance and nowhere in its complaint suggests that Defendant's alleged failure to furnish a 15,000 foot gas holder prevented or impeded Plaintiffs' full performance, Plaintiffs' case is largely made up of such suggestions and they are repeatedly urged here. The inventor of the plant was so little interested in the holder feature that he did not care what size it was (Tr. 283). There were two holders there, one of 5,000 foot and the other 15,000 foot capacity. Vorhees persistently said the

small holder was of 1500 foot capacity (Tr. 142, 143, 156); Cox called it 5,000 feet. (Tr. 256).

Vorhees erected the small holder or installed it as part of the gas plant. (Tr. 143). He was Plaintiffs' engineer in charge of installation. He connected the gas plant with the gas main "which main was connected with the 1500 foot holder." (Tr. 143.) As already stated, no direct connection between the producer and holder was specified by Plaintiff, and Vorhees shows that none was ever contemplated. (Tr. 142). The gas holder was attached to the plant early in May (Tr. 145). Vorhees connected the producer with the mains that ran to the 15,000 foot holder. (Tr. 145). He says, "That gas main led directly into the 15,000 foot holder if the valves were open." (Tr. 152). When he erected the plant he connected the producer with the main by a pipe which he installed (Tr. 153).

On one occasion only, while Vorhees was there, about April 28 or 29 he turned the gas "into the mains of the Company, into the holder through the main," but it was quickly turned out because the plant produced too much soot. (Tr. 154). Vorhees was there seven weeks (Tr. 154). Cox speaks of one occasion when the gas was turned into the 15,000 foot holder through the main (Tr. 205). He admitted the connection with the 15,000 foot holder (Tr. 229), but he found the pipe which Vorhees had installed too small. Its capacity was about one-third that of the gas plant, but he did not change it. (Tr. 168). When we view the cataclysmic consequences of Defendant's alleged failure to furnish a 15,000 foot holder in the light of the foregoing record facts, we have a better basis for judging the decision of the trial court than is furnished by Plaintiffs' incomplete statement. When it is further noted that Plaintiff never wanted any holder except for the purpose of measuring the *quantity*

of gas produced (Tr. 169, 185, 186, 235, 272) and that no one in Plaintiffs' behalf ever suggested to Defendant that it could make cleaner gas by use of a holder or could thereby make the gas conform to the other more important guarantees of the contract, Plaintiffs' argument concerning the holder appears less ingenuous than ingenious.

While ignoring the remaining guarantees of the contract, Plaintiff devotes considerable space to an attempt to explain away the suspended matter contained in the gas produced by this plant. The contract provided that the gas should contain no suspended matter which would be *injurious to the engines or gas conducting pipes* (Tr. 8). The Bulletin which Plaintiff pleaded and proved as a part of the contract, but which it now seeks to discard, explains that.

"It is unnecessary to clean the gas made by the Amet-Eaugin process to a greater extent *than to prevent deposits in the pipes.*" (Tr. 15).

Upon the trial, and in this Court, Plaintiffs' position was and is that clogging the "gas conducting pipes" with soot would not be injurious to them as gas conducting pipes, although as a result they might cease to conduct gas.)P. B. 18, 13, Tr., 176). By offering evidence that the soot would not corrode the iron in the pipes, Plaintiff assumes to have fully met the guaranty of the contract. That is to say a chimney may be so filled with soot as to be wholly useless as a chimney, but if the rock or brick does not disintegrate, it is not injured as a chimney. The tubes of a boiler may become so scaled that the boiler is useless as a boiler, but if its value as old iron is not impaired, it is not injured as a boiler. Even if Plaintiff had not made the Bulletin so indubitably a part of its contract, the utter absurdity and unreasonableness of its position would be too obvious for comment.

Ensign saw the suspended matter with his naked eyes. (Tr. 283). Cox says that while the soot would not injure the pipes it might clog them (Tr. 204). He admitted that when he left Morenci he had not cleaned the gas so as to prevent deposits in the pipes. He says "It couldn't be done." (Tr. 265). But he said the gas could have been used by installing a system of sprays and sluices, that such appliances "would have been necessary" (Tr. 264). Ensign testified to the same effect. (Tr. 295). Also, as we have noted, both of these experts thought the proposed rotary scrubber might get the same result if Defendant had been willing to give them ninety days more in which to get it. These facts need only to be stated to justify the conclusion of the trial court that Defendant could not be forced to supply a system of sprays or sluices or to wait ninety days for a second installation under a contract which contemplated but one. Of course if Plaintiff had a right to make a second installation, it would have an equal right to make a dozen.

ISSUES UNDER THE PLEADINGS

Plaintiff brought suit upon this contract alleging that except for the delay in shipment which was waived by Defendant it had "performed all of the terms and conditions of said agreement to be by it performed." (Tr. 17).

It further alleged that a trial run of the machinery was had from March 27 to May 6, "that upon the said trial the said machinery met each and all of the guarantees specified in said agreement." (Tr. 17).

Thereafter, according to the complaint the Defendant abandoned the contract and refused to proceed further under it, although Plaintiff was willing and ready to continue with the ninety days' trial run which had not been completed (Tr. 17). It was also alleged that although Defendant had agreed

to furnish a 15,000 foot gas holder it had not done so. (Tr. 16). There is not a suggestion in the complaint that this alleged failure on Defendant's part prevented Plaintiff from performing its contract in whole or in part. The complaint, far from alleging any excuse for non-performance positively alleges full and complete performance, as we have seen. It is alleged that owing to Defendant's abandonment of the contract, the ninety days' trial run was not completed. A second cause of action set up the common count for goods, wares and merchandise sold and delivered. Briefly, Defendant's answer (Tr. 21 et seq.) admitted its waiver of Plaintiffs' delay in shipment; denied that it had ever operated the gas plant; denied that it had failed or refused to furnish a 15,000 foot gas holder, alleging that said holder was furnished, in place, connected and ready to use whenever the gas plant was ready to be used with it; denies that upon the alleged trial run said plant met each or any of the guarantees specified in the agreement; denies abandonment of the contract on its part, and alleges abandonment on Plaintiffs' part; denies that Plaintiff was ready or willing to continue with the trial run or that it so notified Defendant; denies performance of the contract by Plaintiff; sets up the specific guarantees of the contract and alleges specifically and in detail the guarantees which were not performed (Tr. 27, 28); alleged that it asked Plaintiff to remove the plant, as provided in the contract, and denied the allegations of the second count of the complaint.

A case was thus clearly made for the application of Paragraph 431 R. S. Arizona, 1913, (1283 R. S. Arizona, 1901) reading as follows:

"In pleading the performance of a condition precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated

generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading shall establish on the trial the facts showing such performance."

The record amply discloses however, that throughout the trial, and in its brief in this court, Plaintiffs' principal efforts have been, and now are, directed toward showing excuse for non-performance, rather than the facts constituting the alleged performance. In the same breath it urges performances and excuse for non-performance. The record shows no request on plaintiffs' part for leave to amend its pleading to conform to this theory. Doubtless, such an amendment would have been permitted if requested, but, in the absence of it, we trust that without appearing unduly technical we may urge that this case is here upon the amended complaint and amended answer shown in the record and must be determined thereon.

ARGUMENT

Plaintiff's first assignment of error is as follows:

"POINTS"

1.

"The court erred in directing a verdict by the jury at the close of the plaintiff's case in favor of Defendant in determining all questions of fact presented by the evidence and in not allowing these issues to be passed upon by the jury." (P. B. 3)

We hasten to take issue on this assignment of error and confidently submit to the court that no possible view of the evidence adduced at the trial of this case, no possible inference to be drawn from such evidence, could under any circumstances support the contention that a question of fact

was presented, which should have been submitted to the jury.

It is obvious, we apprehend, that the written contract was the sole, absolute and unequivocal criterion of the contractual obligation of the contracting parties, and this was a contract which contained a number of specific guarantees to be performed on the part of the plaintiff.

The testimony of the plaintiffs' witnesses, we emphatically maintain thrust one irrefutable conclusion, to the exclusion of all others, upon the trial court, namely: That Plaintiff utterly failed to perform its contractual obligations under its guarantees, and in the same measure failed to show any excuse for non-performance, even if such excuse were admissible under the pleadings, which, plainly, it was not.

In order to demonstrate wherein Plaintiff failed in performance, it becomes necessary for us at the outset to meet and dispose of Plaintiff's assertion that the "Manufacturer's Bulletin" was not made a part of the contract. (P. B. 16)

We submit that the contract *in its entirety* is before the court as a part of the record, and quote as follows, from Plaintiffs' Amended Complaint:

"That on or about the 5th day of December, 1912, Plaintiff made, entered into and executed a certain agreement in writing, as follows:"

(Here appears a recital of contract from beginning to end, including the Manufacturer's Bulletin)

"And that the above is a full and complete copy of said agreement, except that the Manufacturer's Bulletin attached to said agreement contains certain drawings, diagrams and illustrations, which it is impracticable to set forth in this complaint, and Plaintiff hereby gives

notice to defendant that evidence to prove said diagram drawings and illustrations will be introduced at the trial." (Tr. 5 and 6)

MR. SEABURY: We offer in evidence, if your Honor please, the contract which is the subject of the cause of action made between the Smith-Booth-Usher Company, and the defendant, dated at Los Angeles, September 2nd, 1912."

"MR. ELLINWOOD: It is admitted in the complaint. No objection.

"MR. SEABURY: Together with the specifications attached hereto.

"The COURT: It may be admitted. (Tr. 138, 139, 317-329)

Plaintiff having alleged that the Bulletin is a part of the contract and likewise having introduced it in evidence as a part of the contract, it is entirely clear that plaintiff is estopped to claim that the Bulletin is not a part of the contract sued upon. But, for the moment, disregarding Plaintiffs' allegations and proof upon this point, we submit that a mere casual reading of the contract will indicate that the Manufacturer's Bulletin is clearly a part thereof. We quote the first clause of the contract:

"Smith-Booth-Usher Company furnish the undersigned:

"Three (3) two hundred (200) H. P. International Amet Crude Oil Gas Producers: Lined complete with brickwork and concrete, with all piping and valves as *shown in cut on the first page of the company's bulletin hereto attached*: With scrubbers, oil pump, plans and specifications for installation." (Tr. 5)

If this clause, "as shown in cut on the first page of the company's bulletin hereto attached, "were the only mention made in the contract of "Company's Bulletin," it might appear that only the particular part of the Bulletin referred to as "cut on first page" had been incorporated into the contract.

But such is not the case. A further reading of the instrument discovers the second paragraph under head of "company's guarantee," which we quote as follows:

"That it shall be as described in the Manufacturer's Bulletin hereto attached, or of the latest improved design." (Tr. 7).

We submit that every line of printed matter in the Bulletin is in the way of description of the apparatus contracted for; that the clause quoted from the initial paragraph of the contract sufficiently includes the diagram on page 1 of the Bulletin, and that the second paragraph of "company's guarantee" is susceptible of but one interpretation, i. e. : That it is written into the contract for the sole purpose of making Manufacturer's Bulletin a part thereof. *

Starting then with this premise we first direct the attention of the court to the following statement in paragraph VI, under the head of "Company's Guarantee."

"There will be no suspended matter contained in the gas, which will be injurious to the engines or gas conduct-pipes." (Tr. 8)

And again to the following excerpt from paragraph XIII of Manufacturer's Bulletin:

"It should be noted, however, that for engine use, it is unnecessary to clean the gas made by the Amet-Ensign process to a greater extent than to prevent deposits in the pipes." (Tr. 15).

And in the same connection, we quote from the agreed bill of exceptions:

To J. H. COX:

Q. Now, do you know from your practical experience what, if any, effect the existence of suspended matter in such quantities as you found in this particular case would have, either upon the engines or the pipes conducting the gas?"

A. It would have no ill effects upon the engines. It would have no injurious effect upon the pipe, but without a system of sluicing or cleaning the pipes, it might after a period cause the pipes to become clogged." (Tr. 204)

This was the final statement of Plaintiffs' witness on the subject of suspended matter. It was properly noted by the trial court that the contract nowhere contained any provision for installation of "a system of sluicing or cleaning the pipes."

Consequently, after reading into the first quotation from the contract, the relevant expression of the second, and keeping in mind the testimony of Plaintiff's witness, it becomes evident that the existence of "deposits in the pipes" precludes any representation of even so much as substantial performance on Plaintiffs' part.

As a necessary part of the gas producers, it was incumbent upon Plaintiff to furnish a certain scrubber (sometimes called washer). This scrubber was to be "as described in the Manufacturer's Bulletin attached hereto, or of the latest improved design." It was also to be such a scrubber as would "properly perform the duty for which it was known to be intended by the parties." (Tr. 7)

Paragraph XIII, Manufacturer's Bulletin, describes the functions of a scrubber as follows:

"After passing the first water seal, the gas goes through the usual washing or scrubbing process to remove suspended particles, the extent to which this is carried *being dependent on the subsequent use of the gas*, effective appliances for this purpose being supplied with the producers, which it is unnecessary to describe here as they are of every day use in all gas works whatever the system of gas making employed. It should be noted, however, that for engine use it is unnecessary to clean the gas made by the Amet-Ensign process to a greater extent than to prevent deposits in the pipes, as there has never been a case of the slightest injury to engine cylinders from carbon with Amet-Ensign gas. Cylinders which have been in use several years are perfectly clean and show no appreciable wear." (Tr. 14)

During his sojourn in Morenci, Plaintiffs' witness Mr. Cox, modified the washer and scrubber. That these modifications were in a material degree ineffectual is disclosed by his statement made to Defendant's engineers immediately prior to his departure from Morenci.

I had a conversation on or about that date with those gentlemen, as I did almost every day, but the conversation related to this—I stated that I couldn't make the gas cleaner than I was making it at that time and they insisted that the gas should be made cleaner, and I told them that they might have the privilege of trying it themselves, if they wanted to try to make it cleaner, but with the present apparatus I could make no cleaner gas than I was doing at that time." (Tr. 235)

Viewing this testimony in connection with witness' testimony as to the effect of the gas on the pipes of Defendant and the necessity of installing a system of sluicing and wash-

ing the pipes, and then laying both statements beside the following colloquy, in which Plaintiffs' attorney defines its position in regard to its proposal to install a washer such as was used in El Centro, California.

The COURT: You mean to say that this witness' proposition to these people, while maintaining that they had complied with the contract, was simply to remedy an objection which really was not well founded but simply to satisfy them?

MR. SEABURY: That is all Your Honor. (Tr. 177)

It seems that Plaintiff by its own evidence has made out a clear case of non-performance in regard to the furnishing of an adequate scrubber.

That the gas contained suspended matter which would deposit in Defendant's pipes is freely admitted by every expert witness who testified for Plaintiff, as fully appears from our foregoing "Supplemental Statement." In the original installation a horizontal scrubber was substituted for the vertical scrubber specified in the contract because, as Mr. Vorhees testified, it washed the soot and suspended matter out of the gas better than a vertical scrubber. (Tr. 158, 159). The inventor recommended still another scrubber (Tr. 293) known as a centrifugal scrubber. He frankly admits that when this plant was sold, the process of scrubbing the gas was in a somewhat experimental stage. (Tr. 292). When Cox left Morenci, he had made the gas as clean as could be done with the apparatus then installed (Tr. 240). He told Defendant that the horizontal scrubber "does not clean the gas as clean as you desire for your long pipe-lines." (Tr. 246). He admitted to Defendant's general manager, Thomson, that a system of sprays and sluicing would be necessary to remove the deposits from the pipes and permit

Defendant to operate its plant continuously. (Tr. 189). After Mr. Thomson had investigated the proposed centrifugal or mechanical scrubber he told Plaintiff that the cost of handling the soot from the gas plant would be prohibitive. (Tr. 192).

But Plaintiff conceding the deposit in the pipes, has the temerity to argue that it was permitted under the contract to make a gas which would clog Defendant's gas-conducting pipes with soot and render them useless so long as the soot did not impair the value of the pipes as old iron. The statement in the Bulletin that the gas need only be cleaned sufficiently "to prevent deposits in the pipes" is discarded as no part of the contract. The Bulletin further sets forth that the gas upon leaving the producer, "goes through the usual washing or scrubbing process, to remove suspended particles, the extent to which this is carried being dependent on the subsequent use of the gas." (Tr. 14).

But Plaintiff even refuses to consider that language in connection with the specific guaranty of the contract that the plant would "properly perform the duty for which it is known to be intended by the parties hereto." (Tr. 7). The fact, known to Plaintiff, that the gas from this plant had to be conducted through 1000 feet of pipe-line (Tr. 226) over a hill (Tr. 153) to Defendant's plant, is ignored by Plaintiff who retires behind the sole defense that the soot would not corrode or eat up the pipe-line. It boldly asserts that if Defendant wanted to use its pipe-line to conduct gas it must install a system of sprays and sluices.

We submit that under elementary rules, the construction of this contract was a question for the trial court; that it was its duty to "adopt a construction which, under all of the circumstances of the case, ascribes the most reasonable, probable and natural conduct to the parties."

Bellv. Bruen, 1 How. 169; 11 L. Ed., 168.

Hull Coal etc. Co. v. Empire Coal etc. Co., 113 Fed., 256.

It is quite manifest that the trial court's construction of this contract accords with reason and justice, and that Plaintiff has confessed that it did not perform its guaranty against suspended matter in the gas. Plaintiff urges, however, that its failure in this respect was due to Defendant's failure to furnish a 15,000 foot holder, and to Defendant's alleged abandonment of the contract. Several conclusive answers to this are,

(1) The complaint alleges complete performance, does not suggest non-performance of this guaranty or any excuse for non-performance.

(2) The 15,000 foot holder was furnished by Defendant (Tr. 152, 205).

(3) Cox testified that he could not make any cleaner gas with the apparatus then installed and left Morenci without any intention of returning to experiment further with that apparatus in cleaning the gas. (Tr. 264).

(4) No evidence whatever supports Plaintiffs' claim that it wanted to proceed further with that apparatus, or ever offered to do so, or that Defendant ever prevented it from so doing.

Therefore, as far as the "suspended matter" clause is concerned it stands as a record fact that Plaintiff wholly failed to perform that guaranty. We will now consider the other specific guaranties.

Company's guaranty number 4 reads as follows:

"The company guarantees the within described apparatus when working within 90 per cent of its normal

rated capacity of 600 H. P. and using California Asphaltum base crude oil, ranging from 14 to 18 degrees Baume, reduced to 60 degrees Fahr., containing not less than 18,500 B. T. U. per pound and weighing approximately 7.8 pounds per gallon; to deliver at least 415 cubic feet of gas of at least 190 B. T. U. low value for each gallon of said oil fired, or one (1) gallon of oil as above defined with produce 78,500 B. T. U. in heat value of gas ranging from 190 to 210 B. T. U. low value per cubic feet; the gas to be of uniform quality within range of 5 B. T. U. of determined B.

T. U. content of gas in regular operation and to be of similar analytic composition as that given in Manufacturers' Bulletin hereto attached." (Tr. 7).

The foregoing guaranty covers the heat quality, quantity and uniformity of the gas to be manufactured. Nothing could be more specific or definite. The quality of oil to be used is specified as well as its heat contents in British Thermal Units (Abbreviated B. T. U.) and its weight per gallon. The volume of gas to be produced from each gallon is specified, together with the heat contents thereof and it is provided that one gallon of oil as defined in said guaranty will produce 78,500 B. T. U. in heat value of gas ranging from 190 to 210 B. T. U. low value per cubic foot. The gas must be of uniform quality within a range of five British Thermal Units of its determined content in regular operation, and must be of similar analytic composition to that set forth in the Manufacturer's Bulletin attached to the contract.

The analysis set forth in the Manufacturer's Bulletin (Tr. 14) is self explanatory. It is obviously a scientific analysis which cannot be made by guess work. Not one of the expert witnesses who testified for Plaintiff had ever made an analy-

sis of the gas produced or had any personal knowledge whatever as to whether or not it conformed with the guaranty in this respect.

Mr. Smith who testified for the plaintiff was not an engineer. He was the manufacturer of the gas plant in question (Tr. 279). Mr. Ensign, the inventor of the process made no chemical analysis or other test (Tr. 283). He merely observed the plant "by the naked eye." Mr. Cox testified that he did not know whether the gas produced by the plant in question met the foregoing guaranties as to quality or quantity. (Tr. 194). Plaintiffs' counsel then averred that they would prove that the gas was of the same quality required by the contract in every particular. (Tr. 196).

Mr. Cox then described what is known as the tell-tale test which merely consists of burning the gas and observing it. He stated that that test was not used for the purpose of making a chemical analysis, but was merely an operating test by which he could gauge the value of the gas within 10 per cent. (Tr. 200-201).

It is obvious that since the gas was guaranteed to be uniform within a range of 5 B. T. U. and was required to contain 190 to 210 B. T. U. per cubic feet, the tell-tale test would disclose nothing as to whether the guaranteed uniformity had been met. Mr. Cox said "I know there is a method absolutely of making this test in figures, but that was uncommon. It was these chemists' business to get absolutely the figures, the analysis of the gas." (Tr. 202).

Plaintiff offered to prove by Cox what he had heard Dr. Sanberg say about a test of the gas which he had made. This was properly excluded as hear-say. Plaintiff thereupon abandoned all further attempt to elicit the results of the tell-tale test even if they had been admissible (Tr. 201) and

the case was closed for plaintiff without any proof as to the heat contents or uniformity of the gas produced and without testimony as to the volume of gas produced by the generator. Mr. Vorhees testified "I did not make any kind of test for heat value. I do not know what the heat value was of the gas; only hear-say." (Tr. 157). He repeated a statement of Dr. Sanberg that "It was a very good power gas that we were making." (Tr. 146). Cox testified "I did not make a test of the horse power of the one unit of the apparatus that I installed. The test was made by the chemist." (Tr. 212).

Mr. Ensign repeated a hear-say statement made by Mr. Douglas or Mr. LeGrand to the effect that the gas produced was an ideal gas engine fuel. (Tr. 295, 296). Mr. Cox made an attempt to test the volume of gas produced by one unit by running the gas into the small holder and timing it to see how long it would require to fill it; but he could not remember what result he obtained. (Tr. 252, 256).

In view of the foregoing, it is not strange that the learned trial judge upon concluding his careful resume of the evidence used this language.

"Then how could it be said that the plaintiff has established the facts showing that the said apparatus did meet each and all of the guaranties specified in said agreement; especially the warranty with respect to the quality and quantity of gas produced. (Tr. 303-304)."

Upon the foregoing, we submit confidently that upon the trial, plaintiff wholly failed to establish that it performed each or any of the guaranties specified in the agreement sued upon.

Moreover, it is perfectly clear that the evidence offered by Plaintiff wholly fails to show performance in any degree

which would sustain the hypothesis of substantial performance.

Substantial performance by the very nature of the expression presupposes a performance of the substance of the contract. It is based upon a retention of benefits on the one hand and a material fulfillment of the contractual obligations on the other.

The rule seems well expressed by the Circuit Court of Appeals of the Third Circuit in *Bush vs. Jones*, 144 Fed., 942:

“The rule that a substantial performance of a building contract is shown if the work was complete, except as to unimportant particulars, which a reasonable allowance would enable the owner to supply and remedy, is only intended to cover the inconsiderable details of construction, which do enter into the substance of the contract, and cannot properly be extended to a material part of the work.”

Moreover, a recovery is permitted only,

“where the omissions are unsubstantial and such as the parties are presumed not to have had in contemplation when making the contract.”

McElraevy & H. Co. v. St. Joseph's Home, 143 N. Y. Supp. 236.

And it is also true that

“for plaintiff to recover as for a substantial performance it is incumbent on it to show a difference in value between the apparatus installed and the apparatus called for by the contract.”

(*Ibid*).

It is entirely clear upon the foregoing that Plaintiff did not comply with the Arizona statute above quoted requiring

it to prove the facts constituting its alleged performance. Nor did it sustain the burden of proof imposed upon it under the pleadings.

Hannan v. Greenfield, 36 Oreg. 97; 58 Pac., 888;
Witt vs. Old Line Bankers' etc. Ins. Co., 92 Nebr.
763; 139 N. W. 639;

Richardson v. Investment Co. (Wash. 1913) 133
Pac., 773;

9 Cyc. 759.

Plaintiff, in its brief sets up as an excuse for its failure to make tests of the gas as required that it was prevented from so doing by defendant's failure to furnish a holder of the capacity required in "purchaser's guarantee."

We have already shown that plaintiff is absolutely barred by the form and condition of its pleading from showing any excuse for non-performance, having alleged full performance except as to time of shipment.

Section 1283, Chapter 2, Revised Statute of Arizona, 1901, (Paragraph 431, Chapter 5, Revised Statutes of Arizona, 1913) as above quoted, appears (verbatim) on the statute books of a number of the states, and the courts seem to have established the universal rule that excuse for non-performance cannot be shown under a plea of performance.

Cement Co. v. Ullman, 159 Mo., 235; 140 S. W.,
620;

McCormick v. Jordon, 65 W. Va., 86; 63 S. E.,
178;

Building Ass'n vs. State Ins. Co. 29 Ore., 569; 46
Pac., 366;

Hanan v. Goldfield, 36 Ore., 97; 58 Pac. 888;
Durkee v. Carr, 38 Ore., 189; 63 Pac., 117;
Young v. Stickney, 46 Ore., 101; 79 Pac., 345;
St. Paul Fire & Marine Ins. Co. v. Hodge, 30 Tex.
Civ. App. 257; 70 S. W., 574;
St. Paul Fire & M. Co. v. Hodge, 71 S. W. 386.
List Co. v. Chase, 80 Oh. St., 42; 88 N. E., 120.

It is true that there are a number of decisions in Missouri which hold that waiver or excuse for non-performance may be shown under an allegation of performance, but in this connection it is proper to make the point that these decisions are restricted to insurance cases, and it appears in *Murphy v. Ins. Co.* 70 Mo. App. 85, that the Supreme Bench of that state to some extent questions even this departure from the universal rule. Justice Ellison speaks as follows on the point.

"While I recognize the fact that in several opinions it has been assumed so far as concerns insurance cases that a waiver may be proved under an allegation of performance, I do not recede from the position taken in the *McNeish* case. It seems to me to be a reflection on the administration of the law that without pretense of cause or excuse there should be one rule of practice applied to insurance cases and a directly opposite rule to all other cases."

In the same connection we quote from paragraph VI of plaintiff's amended complaint:

"That the trial of said machinery was commenced on or about the 27th day of March, 1913, and continued until the 6th day of May, 1913, or thereabouts; that upon the said trial the said machinery met each

and all of the guaranties specified in said agreement.”
(Tr. 17).

And we venture to state that the fundamental time tested rule of practice that the proof must follow the allegation retains the same efficacy in law the courts and commentators have ever accorded it.

However, at this time and for the purpose of this argument only we will ignore the point of bar to the evidence and meet plaintiff on the merits of its contention.

That there was in the possession of defendant on the premises at all times a holder of 15,000 cubic feet capacity is undisputed. The testimony of both Mr. Vorhees and Mr. Cox shows that they were aware of its existence. In fact, Mr. Cox acknowledges that the reason for incorporating in the contract the requirements of a holder of that particular capacity was because defendant already had such a holder. (Tr. 270).

That the guarantees contained in the contract were correlative and dependent and that the performance of certain of them by their very nature required the prior performance of others cannot be gainsaid. It goes without saying that unless Defendant failed to furnish a holder and unless such failure prevented Plaintiff from performing its contract, such failure would not excuse Plaintiff's non-performance. We have already seen that Defendant did furnish a 15,000 foot holder. Plaintiff did not specify any connection between the producer and this holder. Its specifications pursuant to which the plant was erected showed no such connection (Tr. 271). Plaintiffs' engineer Vorhees installed the 5000 foot holder as a part of the plant, put in a pipe connecting the producer with the gas main, which was connected with the small holder (Tr. 143). The 15,000 foot

holder was also connected with the main and therefore connected with the producer as fully as was ever contemplated by Plaintiffs' specifications (Tr. 145, 152, 229). Moreover, it fully appears that Plaintiff only wanted a holder to be used in measuring the quantity of gas produced (Tr. 169, 185, 186, 235, 272). Mr. Cox could measure the output by using one unit of the producer in connection with the 5000 foot holder, and did so. (Tr. 251). It repeatedly appears in the evidence that Dr. Sanberg made chemical tests of the gas. Therefore, every necessary test could be made without using the 15,000 foot holder, and was so made.

The following testimony of witness Cox shows that Plaintiff never reached a time when it was ready to turn its gas into the 15,000 foot holder:

"The conversation as it related to other matters was in relation to the plant--partially to the plant that was installed. Mr. Thomson made objection to the amount of foreign matter in the gas.....contained in the gas. He said that he had been advised by his engineers that there was too much foreign matter in the gas to enable them to run continuously through long pipe lines or through pipe lines and the gas must be cleaned better than it was being done at that time."

"Q. What, if anything, did you say about that to Mr. Thomson?

"A. I told Mr. Thomson that by a system of sprays and sluicing this gas could be run through these pipe lines *and run into the holder* and would cause no interruption of the service." (Tr. 189).

In other words, Defendant had done as much in the way of furnishing the 15,000 foot holder as it was incumbent upon it to do at that time.

It is not disputed that for the purposes of preliminary experiments a smaller holder was furnished.

“MR. COX: I didn’t ask for the small holder until it was offered to me by Mr. LeGrand. I stated to Mr. George Douglas and Mr. McDougal at that time that it would be necessary to have something, some means of measuring the *quantity* of gas.” (Tr. 235).

The fact that this smaller holder was so accepted warrants the conclusion that it was sufficient for such purposes, and for the period during which it was used as well.

Just prior to leaving Morenci, Mr. Cox had a conversation with Mr. Thomson (Defendant’s General Manager) concerning Plaintiff’s inability to go further with the work.

“Approximately on May 6th I had a conference with Mr. Thomson at his office regarding this plant.”

Q. At that time and place, did you state to Mr. Thomson that you had done everything you could in connection with the plant as it stood and there was no use of staying there longer?

A. I did state to Mr. Thomson that I was unable to furnish the gas any cleaner than I was doing at that time, and there was no use for me to stay during the interval of the engineers trip to inspect another plant.”

Q. Then didn’t Mr. Thomson state to you or ask you if you claimed you were making a satisfactory gas as far as the soot was concerned and you stated to him that you were not?

A. I stated to him that I couldn’t make it any cleaner than I was at that time.

Q. Did you state as I have put the question to you?

A. Not exactly. No.

Q. Didn't you then say to Mr. Thomson that you wished to install a mechanical or rotary washer, which you knew would clean the gas?

A. I did. (Tr. 240)

Witness Cox admitted that he could not make the gas cleaner with the apparatus as installed but claimed that he could clean it absolutely by installing a system of washing, similar to that used at El Centro, California.

It is to be noted that when witness Cox made this acknowledgement of Plaintiff's inability to clean the gas the proposition to Mr. Thomson was not that if he had a 15,000 foot holder he could clean it, but it was if he had a different washer he could clean it. It is obvious that the failure to make the gas contracted for was caused by Plaintiff's failure to furnish a proper washer and not by alleged failure of Defendant to furnish a proper holder.

Assuming for the purpose of this argument only that Defendant did fail to furnish a 15,000 foot holder, as required by the contract, is not the foregoing testimony of Plaintiff's witness significant? Does it not show that even if Defendant did fail to perform (which we do not admit) that Plaintiff's failure to perform was in no way occasioned by it?

When Plaintiff sets up breach on Defendant's part as excuse for failure to perform, it must be such a breach as would prevent Plaintiff from performance.

Mason v. Remp, 41 S. W. 694;

Goldich v. Toelberg, 55 N. Y. Supp., 954;

Plaintiff, while claiming full performance seeks to excuse non-performance by asserting that it was not allowed the full ninety day period for experiment provided in the contract. The only mention made in the contract of a ninety

day period appears under head of "Purchaser's Guarantees," paragraphs 5 and 6. We quote:

"To commence the operation as soon as practicable after completion of the installation and to operate same in accordance with the instructions of the Company's Engineer for a period of ninety (90) days, subject to adjustments of Gas Plant necessary to cause the machinery to give results provided for in this agreement."

"At the end of said ninety (90) days' operation as herein specified, should the Purchaser fail to obtain the results in accordance with the above guarantees, when the Purchaser shall have the right to dismantle the apparatus, load such parts as were received from the Company on board cars for shipment in accordance with the Company's shipping instructions and no payment nor obligation of the Purchase Price on the part of the Purchaser will be required except that which applies to the operating Engineer and the Company shall not be liable for any claim or damage except the return of any part of the Purchase Price paid except that which might have been paid for the operating Engineer." (Tr. 9, 10).

It will be readily discerned that this ninety day period was granted to Defendant. It was not granted to Plaintiff. It was a provision incorporated in the contract for the safeguarding of Defendant's interests. The complete installation of the plant as well as a taking over of it (by defendant) for the purpose of operation was a condition precedent to the inception of the ninety (90) day period. It is clear in the contract that paragraphs 6 and 7 by their very nature could not become operative until the plant was completely installed.

If there is one point certain in the whole transaction between Plaintiff and Defendant, it is that Defendant at no time operated the plant,--in short, the point is not in issue. It is apparent that the Plaintiff is laboring under a misconception of the contract as to the existence of any ninety (90) day period for tests accorded to Plaintiff.

Moreover, as found by the trial court and clearly shown by the record, Defendant did not stop Plaintiff's experiments or prevent its making further attempts with the plant installed. Plaintiff never wanted to try it out any further, never offered to, never was refused permission so to do.

We submit, the argument upon this point having progressed to a conclusion, that a clear failure of proof of performance on the part of the Plaintiff is made out by the evidence, and that an equally clear case of performance so far as required by the contract is established on behalf of Defendant. And we further submit that by reason of these facts, and in view of the issues made by the pleadings, Plaintiff's contention that a question of fact was presented at the trial, which should have been submitted to the jury, entirely falls to the ground. It follows that the court did not err in directing the verdict.

We cite the rule in Federal Courts regarding submission to the jury as laid down by Circuit Judge Hawkins in *New York Central & H. R. R. Co. v. Difendaffer*, 125 Fed. 893:

"The rule in the Federal court is that before the evidence is left to the jury there is or may be in every case a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the burden of proof is imposed; and that it is not proper to submit the case to the

jury merely because some evidence has been introduced, unless that evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence."

Commissioners of Marion Co. vs. Clark, 94 U. S.,
278.

EVIDENCE AS TO OPERATION OF SIMILAR PLANTS

We quote Plaintiff's first assignment of error under point II of their brief.

"(a) Exclusion of evidence as to similar plants."

Plaintiff sought to introduce evidence as to the successful operation of plants similar to that in question in order to establish that the latter complied with the guarantees contained in the contract.

If this evidence had been admitted it would have opened the way for the introduction of evidence by Defendant tending to show the unsuccessful operation of similar plants, whereupon instead of an issue being produced there would have been presented an endless controversy as constantly diverging from the issue as the lines of a hyperbole from the vertex.

In *Osborn & Co. v. Bell*, 28 N. W. 841; 62 Mich., 214, an apparatus was sold with certain guarantees. Plaintiff in offering testimony to prove that the apparatus complied with these guarantees examined one of its agents as to the operation of similar machines sold in that vicinity. The court said:

"The merits of the other machines referred to were not the issue in this case, nor the manner of their working. The operation of the machine sold to the Defend-

ant and the manner in which it did the business, which it was warranted to do, was the only question then under consideration and the manner the other machines did their work did not tend to prove that the operation of the one in question was in accordance with the promises of Plaintiff. The evidence was inadmissible and was well calculated to prejudice the rights of the Defendant before the jury."

Watkins et al. v. Phelps, 130 N. W. 618; 165 Mich., 180;

Gage vs. Meyers, 26 N. W., 522; 59 Mich., 300;

Second Nat'l. Bank v. Wheeler, 42 N. W. 963;

McCormick Co. v. Cochran, 31 N. W. 561;

Altman v. Fowler, 37 N. W. 708;

Wicks Bros. v. Electric Co., 38 N. W., 299;

Brummett v. Nemo Heater Co., 177 Mass., 480;
59 N. E., 58;

Osborne v. Bell, 62 Mich., 214; 28 N. W., 841;

If Plaintiff is right in its present contention, it would have been proper for Defendant to prove defects in the gas plant at El Centro by way of showing that the Morenci plant was defective. Such evidence, of course, would have been inadmissible.

Fetzer v. Haralson, 147 S. W., 290, 295 (Tex. Civ. App. 1912.)

EXCLUSION OF GENERAL STATEMENTS OF PERFORMANCE

Plaintiff complains that the trial court sustained objections to the following questions to expert witnesses:

"Q. Now, after this apparatus of yours was installed, are you able to say whether or not it properly performed

the function of a three two hundred horse power Amet crude oil gas producer?

To which an objection was sustained upon the ground that the witness should be confined to the functions specified in the contract. (Tr. 208-211).

“Q. Now, Mr. Cox, do you know the function to which two hundred horse power International Amet crude oil gas-producers, such as was installed in this case, are usually and customarily put?

To which an objection was sustained on the ground that the customary use of such producer was immaterial and irrelevant and that testimony should be confined to the particular case under the contract. (Tr. 212).

The correctness of these rulings is challenged by Assignment of Error II (P. B. 34). The learned trial judge in disposing of this matter used this language which is unanswerable.

“If that were true all a man would have to do when he makes guarantees, regardless of how many there are in the contract, would be simply to put the witness on the stand and ask whether or not the machinery furnished, if it be machinery, properly performed the duty for which it was sold or intended.” (Tr. 211).

Earlier, in the course of the trial, Plaintiff's counsel had conceded the point thus made by the trial court, saying:

“I don't believe Your Honor, that we can say the effect of this machine was to produce gas such as required by the contract between Plaintiff and Defendant. But I do believe that he can say that we produced gas of such and such a quality, and show how he found that out.” (Tr. 197).

That counsel's above quoted statement is correct, and his present argument incorrect, is apparent from the following authorities:

- Fisher v. Monroe, 17 N. Y. Supp. 837;
Walshe Mfg. Co. v. W. T. Smith Lumber Co., 59
So., 455, (Ala. 1912).
Standard Fire Ext. Co. v. Heltman, 194 Fed., 400
(C. C. A.)
Culbertson v. Ashland Cement etc. Co., 139 S. W.,
792; 144 Ky., 614;
Anderson Elcetric Co. v. Cleburne Water etc. Co.,
23 Tex. Civ. 328; 57 S. W., 575;
Billy v. Thomas Gin-Compress Co., 33 Okl. 254;
124 Pac., 1093;
Fowler v. Delaplain, 79 Oh. St. 279; 87 N. E., 260;

The above authorities are not met by the cases cited by Plaintiff (P. B. 35). The substance of Plaintiff's position is that an expert on gas-plants should be permitted to testify as an expert upon the performance or non-performance of contracts, a subject not within the field of expert testimony. Moreover, the two questions above quoted are insufficient to support counsel's theory because they do not in any way relate to the specific contract sued upon. We submit that the court's ruling was sound.

ASSIGNMENT OF ERROR III.

"The court erred in sustaining defendant's objection to and excluding testimony offered by the plaintiff, by which plaintiff proposed to show the circumstances existing at the time the defendant refused to go on with the contract, and that plaintiff never abandoned the contract, but was ready, willing and able to, and did, perform the terms and conditions of the contract to be by it performed. For the purpose of eliciting this testimony, plaintiff propounded the following questions:"

Under this specification (Tr. 65 to 86,) appears testimony of witness Cox in regard to his conversations with Mr. Thomson and Dr. Sanberg, just prior to his departure from Morenci.

Objection was offered to the introduction of this evidence on the ground that it tended to modify the contract. Counsel for plaintiff contended that such was not the purpose of the evidence and the jury was excused until the purpose could be ascertained by the court. After hearing the testimony in question the objection was sustained. The court spoke as follows:

“The COURT: I didn’t sustain it on the theory that they were not entitled to prove what was done by either of these men as agents, but as to any conversation which they may have had looking to the modification of the contract. This was objected to and I sustained the objection on the ground that the evidence would show a modification of the contract or was for the purpose of showing such modification.”

The jury was recalled and the witness was interrogated.

“Q. Mr. Cox, prior to your departure from Morenci on May 7th, 1913, did you have a conversation with reference to that departure with Mr. A. T. Thompson, General Manager of the defendant company?”

“A. I did.”

“Q. Will you tell us what the conversation was?”

Objection is interposed.

“The COURT: It is almost impossible for the court to tell whether that evidence will show a modification or not. If it was something that was discussed and something that had been eliminated at the time they were

discussing this apparatus or lamp black or something else, it might be admissible. The question itself is not objectionable. The objection is overruled."

"A. I had a conversation with Mr. Thomson regarding the matter of an extension of the 90 day period of the tryout of the plant." (Tr. 76, 79).

Objection was here interposed and sustained upon the ground that the matter was "wholly incompetent, irrelevant and immaterial."

Witness continued:

"The conversation as it related to other matters was in relation to the plant--partially to the plant that was installed. Mr. Thomson made objection to the amount of foreign matter in the gas--contained in the gas. He said that he had been advised by his engineers that there was too much foreign matter in the gas to enable them to run continuously through long pipes or through pipe lines, and the gas must be cleaned better than it was being done at that time."

"Q. What, if anything, did you say about that to Mr. Thomson?"

"A. I told Mr. Thomson that by a system of sprays and sluicing this gas could be run through these pipe lines and run into the holder and should cause no interruption of the service, but if he desired it cleaned better than it was being cleaned, why, I knew of an apparatus that had lately been tried or had been tried since the shipment of this plant from Los Angeles, whereby the gas could be cleaned absolutely. He agreed then to send an engineer to inspect this plant and be governed by the report of the engineer."

"MR. ELLINWOOD: That is the matter we have already talked about and we ask that that be stricken out. We would not have any objection to going into this entire matter but since it is not pleaded that we agreed that they should have an extension of time, for them to go and make a different installation, and since the issues are confined to the installation of the machinery, we object to the proposal of another and different installation being testified to."

"The COURT: Any agreement which the witness stated he had made with the engineer or with Mr. Thomson for a modification of the contract is excluded. Any conversation there with reference to the presence of suspended matter is excluded." (Tr. 80-81).

The foregoing statement by witness Cox demonstrates that the evidence, which was excluded, would either have tended to show a modification of the contract on the one hand, (which was not pleaded), or on the other hand have gone to the introduction of certain matter which admittedly was not by way of showing performance of the contract. It should be noted that the court took particular pains to exclude only such statements as would tend to show a modification of the contract and not to exclude any conversa-

It seems that Plaintiff has propounded a dilemma. If the conversation related to something done under the contract, it would be inadmissible for the reason that it tended to prove an oral modification of a written agreement not alleged in the complaint; if it related to something done outside of the contract it would be inadmissible for the reason that it did not tend to show performance of the contract, under the allegation of full performance. We submit that Plaintiff is gored by either horn of the dilemma. Likewise, it is clear that such evidence was not admissible to negative or rebut

Defendant's plea of abandonment, since such rebuttal would be out of order and no part of Plaintiff's main case.

EXCLUDED TESTIMONY CONCERNING DR. SANBERG'S STATEMENTS AND TESTS:

ASSIGNMENT OF ERROR III. AND IV. (Tr. 84, 85, 86)

The questions propounded to witness Cox and to which answers were excluded, together with other relevant portions of the testimony appear at pages 83, 84, 85, 86, and 90 of the transcript. It nowhere appears from the record what answers the witness would have made to the questions or whether or not such answers, if admitted, would have been relevant or material, or would have tended to prove any of the allegations of Plaintiff's amended complaint. Plaintiff did not make any offer, or suggest anything as to the nature of the evidence to be elicited. Rule 24, 2 (b) of this court provides, "when the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected." This rule states a salutary and well established rule of practice which has been followed in many cases.

In relation thereto, we quote from the decision in *Hornbuckle v. Stafford*, 111 U. S., 389; 28 L. Ed., 468:

"But in order to sustain the exception to the exclusion of the pleadings in the case of *Gallagher vs. Basey*, it was necessary that the exception should show what the excluded testimony was, in order that it might appear whether the evidence was material or not."

The Supreme Court of Arizona in *Tietjen v. Sneed*, 3 Ariz., 195, 198, discussing the same point, used the following language:

“And further it is not shown what answer would have been made by the witnesses, and we cannot assume that they would or would not have been favorable to the appellant. If the answers would have been adverse to the appellant, he would not have been injured, and cannot complain, and, if the answer would have been favorable, the record should have shown the fact to have disclosed the error. The party alleging the error must establish it.”

In *Ladd vs. Missouri Coal etc. Co.*, 66 Fed., 880, decided by the Court of Appeals of the Eighth Circuit, the court used the following language directly applicable to the case at bar:

It will be observed that all that the plaintiff offered to prove was “the conversation between him and Murdock relating to the contract.” This offer was not accompanied by any statement as to what that conversation was, or that it was material to any issue then being tried. The insufficiency of the exception is rendered apparent by a single consideration. If this court should reverse the case because the witness was not permitted to state the conversation, what is there in this record to show or suggest that upon another trial, when the witness is allowed to state the conversation, a single word of it will be material to the case or admissible in evidence? The offer to prove the “conversation,” without some statement as to what it was, and showing its materiality, was too general to be made the foundation of a valid exception. The rule is well settled that the bill of exceptions must show the materiality of the evidence which was tendered and rejected. The evidence rejected, or a statement of what it tended to prove, must appear in the bill of exceptions.”

In *Myers vs. Brown*, 102 Fed., 250, decided by this court, which was an action for alleged infringement of a patent, error was claimed in excluding the judgment roll in another case in which the validity of the same patent was involved. In disposing of the matter, this court said:

“It is next urged on the part of the plaintiff in error that the court below erred in refusing to admit in evidence the judgment roll in the case of *Gaskell v. Myers*. It is a sufficient answer to this point to say that that judgment roll is not embodied in the bill of exceptions, nor does it appear anywhere in the record.”

To the same effect:

Ariz. & N. M. R. R. Co. v. Clark, (9th C. C. A.)

207 Fed. 817;

Briggs v. Chicago etc. Ry. Co. (8th C. C. A.) 125

Fed., 745, 748;

Dresser v. Canadian Pac. Ry. Co. (7th C. C. A.)

116 Fed., 281, 285;

Laflin v. Shackelford (5th C. C. A.) 98 Fed. 372.

Moreover, aside from the foregoing, it appears that plaintiff, offered certain figures which the witness Cox had copied from certain other figures given him by Dr. Sanberg, an employee or agent of defendant (Tr. 253). Cox was in the room when the analysis was made and saw Dr. Sanberg write down the figures (Tr. 252). He understood Dr. Sanberg was chief chemist of the defendant company. Defendant's general manager said he was there for the purposes of making the test. (Tr. 84).

This showing falls far short of bringing the matter within the rule stated in *Rohm v. Deig*, 121 Ind. 289; 23 N. E. 141, 144, cited by plaintiff (P. B. 37), wherein the court used the following language:

“And if the agent had authority to pass upon the quality of the corn, and accept it, and he did so, it would bind the defendant.”

There is no suggestion in the record that Dr. Sanberg had authority to pass upon the sufficiency of the gas plant or accept it. Similarly in *McPherrin v. Jennings*, 66 Ia. 622, 624, cited by plaintiff, (P. B. 37) wherein it appeared that “the agent had authority to receive the pay and deliver the team.” An admission is an acknowledgment of a fact of which it is evidence only in the essence that it dispenses with proof of the fact. To be binding it must necessarily be made by the party himself against whom it is introduced or by some one having authority at the time to speak for him in the premises. It is nowhere suggested by the proof that Dr. Sanberg was authorized to speak for defendant as to the matter in question.

Auditorium Theater Co. v. Ore. etc. Co., (Wash. 1914) 137 Pac. 489, 491.

Moreover, as we have pointed out, there is nothing whatever in the record which supports counsel's statement that the excluded testimony “would have tended to prove performance of the guarantees as to the quality of the gas” or that the exclusion of the evidence was prejudicial to plaintiff (P. B. 37).

We quote Plaintiff's assignment of error, paragraph IV:

“The court erred in sustaining Defendant's objection to and excluding expert testimony offered by the Plaintiff, by which Plaintiff proposed to show the tests made of the plant in question. The reason why the test made by Plaintiff was made in the way it was made, the result achieved by the test and the difference due to Defendant's failure to furnish 15,000 foot gas holder. For

the purpose of eliciting this testimony, Plaintiff propounded the following questions: (Tr. 86)

Guarantee number IV, under head of "Company's Guarantee," Plaintiff's exhibit "A," page 319 describes the gas which Plaintiff was to furnish.

Plaintiff's witness was asked if the gas complied with this guarantee. He replied that he did not know (p. 87). Subsequently, he sought to explain why he did not know. As previously pointed out Plaintiff has pleaded full performance of the contract on its part, (Tr. 17) and at this time an attempt to introduce evidence is made by way of excuse of non-performance. That such a showing is not allowable has already been indicated. We respectfully refer the attention of the court to the argument there set forth and the cases cited.

Assignment of Error number V reads as follows:

"The court erred in sustaining defendant's objection to and excluding expert testimony offered by the Plaintiff by which Plaintiff proposed to show the harmless effect of the suspended matter in the gas generated by the plant in question. For the purpose of eliciting this testimony, Plaintiff propounded the following questions." (Tr. 91).

Plaintiff's guarantee number V (Tr. 319) states: "There will be no suspended matter contained in the gas which will be injurious to the engines or gas conducting pipes."

Paragraph XIII of Manufacturer's Bulletin (Tr. 327) states:

"It should be noted, however, that for engine use it is unnecessary to clean the gas made by the Amet-Ensign process to a greater extent than to prevent deposits in the pipes."

We quote the testimony in full under this assignment.
To J. H. COX

“Q. Now do you know from your particular experience what, if any, effect the existence of suspended matter in such quantities as you found in this particular case, would have either upon the engine or the pipes conducting the gas?”

“A. It would have no ill effect as upon the engine. It would have no injurious effects upon the pipes, but without a system of sluicing or cleaning the pipes it might after a period cause the pipes to become clogged.”

“Q. Would the removal of the suspended matter to which you have referred consist of anything except the ordinary cleansing of the pipes or place where the suspended matter deposited itself.”

“MR. ELLINWOOD: We object to that. The contract and exhibit attached to it point out that this process which they are going to install should be sufficient to clean the gas so there would be no deposit in the pipes. It does not provide that there should be any sluicing of the pipes after they were put in there.” (Tr. 91-92).

“The COURT: The objection is sustained.”

Having shown the court that the Manufacturer's Bulletin is a part of the contract in previous argument which it is pointless to reiterate at this time, it now appears that plaintiff was bound by the contract to clean the gas so that there would be no deposits in the pipes, and it also appears that the contract did not contemplate any installation of a system of washing and sluicing such as witness mentions. It follows then that any testimony purporting to show the harmless effect of such gas upon the pipes is decidedly outside of the question, and for that reason incompetent, irrelevant and

immaterial, and not in line with a showing of performance of the contract under the allegation of full performance.

Plaintiff's assignments of error VI and VII (Tr. 92, 116) are to the admission of testimony.

This case did not go to the jury, therefore, the question of the credibility of witness Cox was not up for consideration. Under any view of this evidence, it is clear that either its admission or its exclusion could have no material effect upon Plaintiff's case, and it is equally clear that if we assume for the purpose of this argument that the evidence should have been admitted and view it in the light most adverse to Plaintiff's case, it could not constitute prejudicial error, but at most could be no more than harmless error.

"Alleged errors, which the record conclusively shows could not have affected the decision and judgment work no prejudice and constitute no ground for reversal."

Commissioner of Lake Co. v. Keene, etc., 108 Fed., 505;

Amadeo v. Northern Assurance Co. 201 U. S., 194;

Chicago City Ry. Co. v. Bundy, 71 N. W., 28;

Freeman v. Dodge, 57 Atl., 884;

As to the suggestion that it was improper to cross-examine Mr. Cox as to physical conditions, topography, etc., at Morenci, touching the use to be made of this gas plant, it is only necessary to point out that upon direct examination in qualifying as an expert, Mr. Cox said that in order to know as to the operation of a gas plant it was necessary "to know that the gas was the proper kind for the purpose for which it was used" (Tr. 160). He recalled what, by the terms of the contract, was declared to be the purpose for which this apparatus was intended by the parties (Tr. 194). The apparatus was guaranteed to perform "the duty for which

it is known to be intended by the parties hereto" (Tr. 7). Cox had testified on direct examination concerning Defendant's long pipe lines, (Tr. 189) and on re-direct, that he knew the function "which the parties to that contract intended that apparatus to perform" (Tr. 212), described that function as he understood it, and stated that he participated in the negotiations leading up to the contract. Therefore, Plaintiff clearly opened the door for us to cross-examine fully as to his knowledge of the use for which this apparatus was intended.

To Plaintiff's suggestion that the credibility of Cox was not in issue we reply that we had an undoubted right on cross-examination to confront him with his prior statements in contradiction of his testimony in chief, both as going to his credibility and as laying a foundation for impeachment. It is immaterial whether the statements were oral or written.

Chicago etc. R. Co. v. Artery, 137 U. S. 519; 34 L. Ed., 747.

Toplitz v. Hedden, 146 U. S., 252; 36 L. Ed., 961;

It is clear under the holding in the Artery case, *supra*, Defendant was well within its rights in cross-examining Mr. Cox concerning the letter written by him to Defendant, designated as "Defendant's Exhibit 6 for identification." (Tr. 117).

Plaintiff's Assignment of Error number VIII (Tr. 125) relates to the exclusion of testimony which proposed to show the limits of authority of Mr. Cox to act on behalf of Plaintiff. For the purposes of this proceeding in error the question as to Mr. Cox authority, or the scope of his authority, is without bearing, or relevancy.

Plaintiff's Assignment of Error number IX (Tr. 126) relates to the excluding of testimony offered by Plaintiff,

which proposed to prove the second cause of action alleged in the complaint for goods, wares and merchandise sold and delivered.

That Plaintiff's position is untenable, needs no demonstration.

We invoke an application of the well settled rule of law expressed by the legal maxim "*Expressum facit cessare tacitum.*"

"Where there is a written contract to perform certain work assumpsit for work and labor done will not lie. The plaintiff must sue upon the contract so long as the parties profess to act under it."

Hawk v. Walworth, 4 Ark., 577;

Jones v. Trinity Parish, 19 Fed., 59;

Stewart & Co. v. Fulton, 184 Fed., 719;

Ballentine v. Young Wing, 146 Fed., 621;

Marshall v. B. & O. R. R., 57 U. S. 953;

Hubbard v. N. Y., B. E. & Western Inv. Co., 119 U. S., 548;

Hawkins v. U. S. 96 U. S., 607;

The question here involved is directly answered adversely to Plaintiff's contention by the Court of Appeals of the Eighth Circuit, in Barnett vs. Beggs, 208 Fed. 255, 258, wherein the maxim above quoted is specifically applied to a situation identical with that presented here. In the case at bar a written contract was declared upon by plaintiff. Defendant admitted that such contract had been made. The contract itself was admitted in evidence without objection, thereby excluding the possibility of an implied contract covering the same matter. If the existence of the express contract had been denied, or if the record left some doubt as

to whether or not Plaintiff had proven the express contract as alleged, a different case would have been presented, falling within the rules laid down in Willard vs. Carrigan, 8 Ariz. 70. Upon the record presented here it is obvious that the authorities cited by Plaintiff (P. B. 46) concerning election between counts are inapplicable.

MISCELLANEOUS

Plaintiff complains that upon cross-examination of Mr. Cox Defendant was permitted to elicit that the new gas plant was to produce gas with greater economy than the Defendant's old plant (Tr. 224, 225, P. B. 40). The Bulletin attached to the contract sets forth that the Amet-Ensign process will effect a saving of cost of at least three-fourths over a plant manufacturing gas from gasoline or distillate, and at least two-thirds over the ordinary steam plant; that these economies are in the reach of all by the installation of the Amet-Ensign process and that "this guarantee extends to the removal of the apparatus and refund of cost if not fulfilled." (Tr. 10, 11). The witness had testified on direct examination that he knew the functions which the parties intended the gas plant to perform; knew what the contract provided and had participated in the negotiations leading up to the contract. (Tr. 194, 212). Therefore the cross-examination was clearly within the scope of the direct examination.

It is also complained of that Mr. Cox was cross-examined as to statements made by him to two of Defendant's engineers (P. B. 42). This examination touched the credibility of the witness and as above shown it was proper as laying a foundation for impeachment. It was admitted by the court "for the purpose of going to the witness' credibility only." (Tr. 234). This is equally true of all of the cross-examination of Cox now complained of (P. B. 42, 43, 44).

Plaintiff's complaint that Cox was permitted on cross-examination to testify as to the reason for specifying a 15,000 foot holder (P. B. 44, 45) is disposed of in the same manner. Furthermore, such cross-examination was proper as touching Plaintiff's claim, not supported by the pleadings, that it was prevented from performing its contract by the lack of a 15,000 foot holder. It was also proper as enabling the Court to construe the contract between the parties.

But aside from all this, it is obvious that the matters elicited upon such cross-examination have no bearing or importance in the proceeding in error, and could only be complained of after the case had been decided by a jury. Similarly, as to the Court's exclusion of testimony as to the authority of Mr. Cox, which was wholly irrelevant to the question whether he had made statements contradicting his testimony. (P. B. 45). Moreover, on the trial, counsel disclaimed any intention to question Mr. Cox's "authority to do what he did" (Tr. 277), but indicated that the excluded testimony was in relation to "a mess of correspondence, identified but not offered in evidence" (Tr. 277). Obviously it was out of order and could only be admitted as rebuttal in the event that Defendant, as part of its case, introduced the identified documents in evidence. Also, there is nothing in the bill of exceptions to show what evidence was sought to be elicited or that its exclusion could have been prejudicial.

Plaintiff's final assignment is that the trial court erred in overruling its motion for new trial (P. B. 47). We understand that error may not be assigned upon such ruling.

Ayers v. Watson, 137 N. S. 584; 34 L. Ed. 803, 809;

Philip Schneider Brewing Co. v. American Ice Mach. Co., 77 Fed. 138.

CONCLUSION

Plaintiff concludes its brief by referring to the trial courts "Unauthorized assumption and exercise of the functions of the jury." (P. B. 48). We have searched the record and Plaintiff's brief in vain for anything in the evidence proving or tending to prove that this gas plant met the guaranties specified in the contract. Plaintiff makes but slight attempt to argue that the evidence shows performance. Its particular effort is to show excuse for non-performance. If its complaint had been drawn upon such theory an entirely different case would be presented. But since Plaintiff saw fit to allege that, except for time of delivery, it had fully performed the contract, and that the machinery upon a test run met all of the guarantees of the contract, the issue here presented is clear and specific and was correctly stated and appreciated by the trial court, namely, did plaintiff prove the facts constituting its performance of the contract? We assert confidently that the records answers this question in the negative.

Plaintiff cites numerous authorities touching the direction of verdicts (P. B. 28, 29) and quotes several California decisions on this point. We content ourselves with quoting the language of Mr. Justice Miller in *Pleasants v. Fant*, 89 N. S. (22 Wall.) 116:

"In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor; that is the business of the jury; but conceding to all the evidence offered the greatest probative force which according to law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and

grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be, that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury."

Respectfully submitted,

EVERETT E. ELLINWOOD,

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Attorneys for Defendant in Error

No. 2476

United States
Circuit Court of Appeals

For the Ninth Circuit.

MERCHANTS & INSURERS' REPORTING
COMPANY, a Corporation, and PHOENIX
FIRE UNDERWRITERS, a Corporation,
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Transcript of Record.

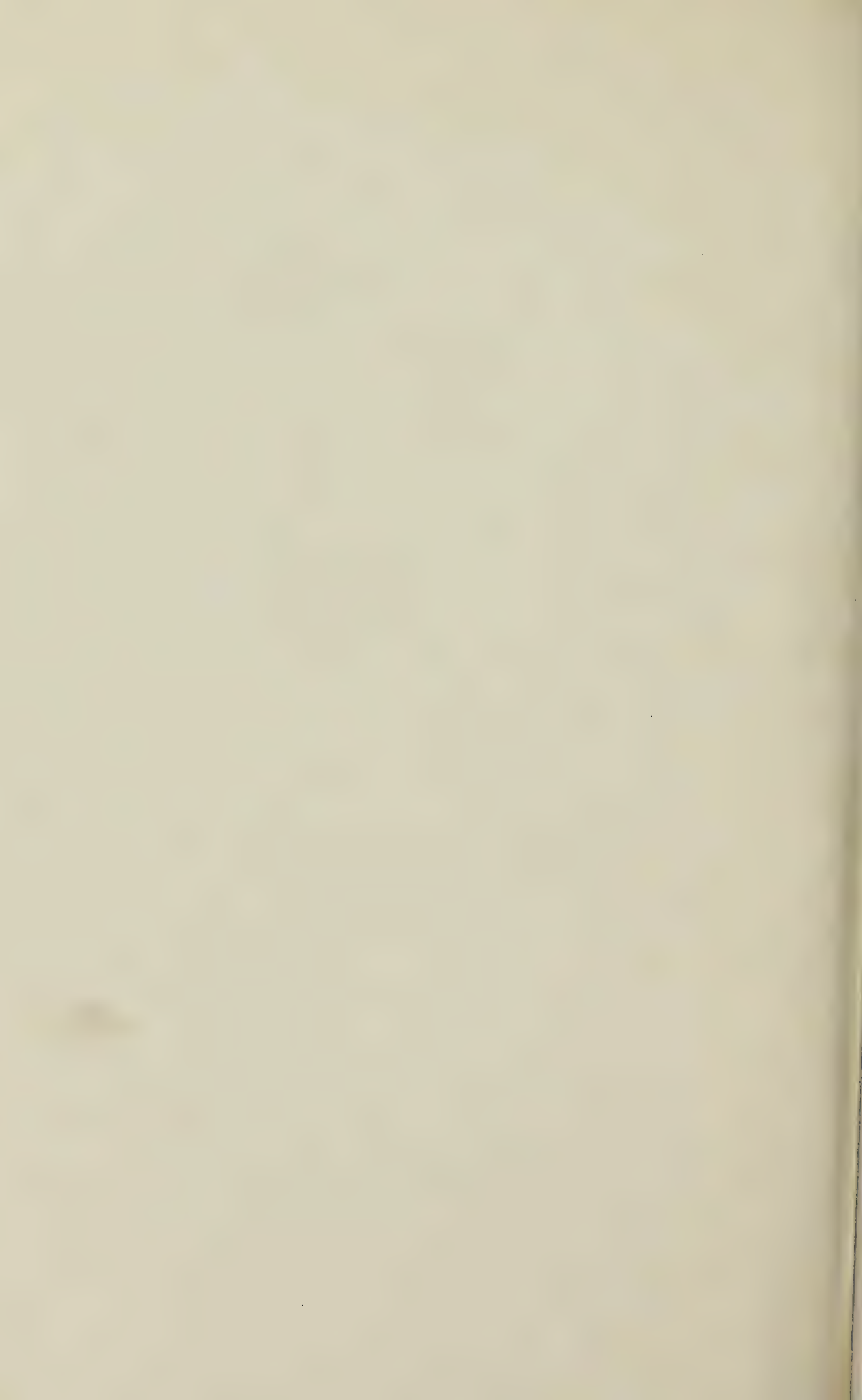
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States District Court for the District
of Arizona.*

MINUTE ENTRY APPEARING UNDER DATE
OF NOVEMBER 12, 1913.

E.—14.

MERCHANTS & INSURERS' REPORTING
CO.,

Complainant,

vs.

PHOENIX FIRE UNDERWRITERS,

Defendant.

Comes now the complainant herein, by its counsel, Struckmeyer & Jencks, Esquires, and in support of its plea for the dissolution of the defendant corporation, introduces in evidence, H. A. Davis, who was duly sworn and examined, and filed nine exhibits, viz.: Exhibits "A," "B," "C," "D," "F," "G," "H," and "I," and thereupon the complainant rested its case; and the defendant herein, by Sloan, Seabury & Westervelt, Esquires, its counsel, joined in said prayer for dissolution and thereupon the defendant rested its case. Whereupon the Court takes the matter under advisement until a future day hereof.

[2*]

*Page-number appearing at foot of page of original certified Record.

**Plaintiff's Exhibit "A" [Resolution of Board of
Directors of Merchants & Insurers' Reporting
Co., Dated October 22, 1913].**

OFFICERS:

John Castera, President.
Marshall Stimson, Vice-President.
H. Y. Stanley, Sec. and Treas.

DIRECTORS:

John Castera.
Marshall Stimson.
H. Y. Stanley.
W. A. Johnstone.
F. W. Boynton.

Capital Stock \$500,000.

**MERCHANTS AND INSURERS REPORTING
CO.**

(Incorporated.)

359-360 I. W. Hellman Building,
411 South Main Street.

Removed to

913 International Bank Bldg.,
Los Angeles, California.

Phone Main 1786.

Moved that a proxy be issued to L. H. Civile for the purpose of voting the stock of the Merchants & Insurers Reporting Company in any special or regular meeting to be called for the purpose of dissolving the Bankers Fire Insurance Company and the Phoenix Fire Underwriters, the Merchants & Insurers Reporting Company holding over two-thirds of the shares of the stock of said companies.

Resolution was passed as follows:

RESOLVED—That we, the Board of Directors of the Merchants & Insurers Reporting Company, the owner of 996 shares of the Phoenix Fire Underwriters and 1996 shares of the Bankers Fire Insurance Company, hereby appoint L.

H. Civile its true and lawful attorney to represent it at any special meeting of said corporation held between this date and January 1st, 1914. And we authorize the President and Secretary to execute such proxy in behalf of this Company.

This is to certify that the above is a true and correct copy of a motion made at the Directors meeting of the Merchants & Insurers Reporting Company, held October 22nd, 1913.

(Seal) (Signed) H. Y. STANLEY,
Secretary.

[Endorsements]: Filed Nov. 12, 1913, at — M. George W. Lewis, Clerk. By Frank E. McCrary, Deputy. [3]

Plaintiff's Exhibit "B" [Resolution of Board of Directors of Merchants & Insurers' Reporting Co., Dated October 18, 1913].

OFFICERS:

John Castera, President.
Marshall Stimson, Vice-President.
H. Y. Stanley, Sec. and Treas.

DIRECTORS:

John Castera.
Marshall Stimson.
H. Y. Stanley.
W. A. Johnstone.
F. W. Boynton.

Capital Stock \$500,000.

**MERCHANTS AND INSURERS REPORTING
CO.**

(Incorporated.)

359-360 I. W. Hellman Building,
411 South Main Street.

Removed to

913 International Bank Bldg.,
Los Angeles, California.

Phone Main 1786.

At a special meeting of the Stockholders of the

4 *Merchants & Insurers' Reporting Co. et al.*

Merchants & Insurers Reporting Company, legally called at Symphony Hall, Los Angeles, California, October 18th, 1913, the following resolution was read by Mr. Castera:

BE IT RESOLVED—That the Board of Directors of the Merchants & Insurers Reporting Company be and are hereby instructed to take the proper and necessary steps in conjunction with the Bankers Fire Insurance Company and the Phoenix Fire Underwriters to dissolve the two Arizona Companies as soon as possible.

Motion was made and seconded that this resolution be adopted. Motion carried unanimously.

This is to certify that the above is a true and correct copy of a resolution passed at the Stockholders' meeting on October 18, 1913.

(Corporate Seal)

(Signed) H. Y. STANLEY,
Secretary.

Attested.

[Endorsements]: Filed Nov. 12, 1913, at — M. George W. Lewis, Clerk. By Frank E. McCrary, Deputy. [4]

**Plaintiff's Exhibit "C" [Proceedings Had at
Directors' Meeting of Merchants & Insurers'
Reporting Co., Dated October 22, 1913].**

OFFICERS:

John Castera, President.
Marshall Stimson, Vice-President.
H. Y. Stanley, Sec. and Treas.

DIRECTORS:

John Castera.
Marshall Stimson.
H. Y. Stanley.
W. A. Johnstone.
F. W. Boynton.

Capital Stock \$500,000.

**MERCHANTS AND INSURERS REPORTING
CO.**

(Incorporated.)

359-360 I. W. Hellman Building,
411 South Main Street.

Removed to
913 International Bank Bldg.,
Los Angeles, California.

Phone Main 1786.

Moved that the memorandum of agreement made on October 21st between the Arizona Companies and the Fireman's Fund of San Francisco be approved by the Directors of this Company. Also that the guarantee made by Mr. Castera in behalf of this Company be endorsed and confirmed. Carried.

This is to certify that the above is a true and correct copy of a motion made at the Directors meeting of the Merchants & Insurers Reporting Company, held October 22d, 1913.

(Corporate Seal)

(Signed) H. Y. STANLEY,

Secretary.

Attested.

[Endorsements]: Filed Nov. 12, 1913, at — M. George W. Lewis, Clerk. By Frank E. McCrary, Deputy. [5]

Plaintiff's Exhibit "D" [Resolution of Board of Directors of Merchants & Insurers' Reporting Co., Dated October 6, 1913].

OFFICERS:

John Castera, President.
Marshall Stimson, Vice-President.
H. Y. Stanley, Sec. and Treas.

DIRECTORS:

John Castera.
Marshall Stimson.
H. Y. Stanley.
W. A. Johnstone.
F. W. Boynton.

Capital Stock \$500,000.

**MERCHANTS AND INSURERS REPORTING
CO.**

(Incorporated.)

359-360 I. W. Hellman Building,
411 South Main Street.

Removed to
913 International Bank Bldg.,
Los Angeles, California.

Phone Main 1786.

Motion was made by Mr. Stimson, seconded by Mr. Boynton that the following resolution was offered and carried unanimously:

WHEREAS—In the adjustment of affairs of the Merchants & Insurers Reporting Company, in its relation to the Bankers Fire Insurance Company and the Phoenix Fire Underwriters, the stock of which is practically owned by the Merchants & Insurers Reporting Company, it has been necessary to transact considerable business between the three companies; and

WHEREAS—In the transaction of this business it has been necessary that certain sums of money be expended for various purposes, such as, return premiums, traveling expenses, attorney fees and salaries.

BE IT THEREFORE RESOLVED—That the Board of Directors of the Merchants & Insurers Reporting go on record with the statement that they have had full knowledge of all such expenditures and that such expenditures have been made with the approval of this Board; Furthermore, that this Board of Directors endorses and commends the action of Messrs. Davis, Civile and Feldman in the handling of the affairs of the Arizona Companies, namely, Bankers Fire Insurance Company and the Phoenix Fire Underwriters, and wishes to state further that the relation existing between the present Board of the Merchants & Insurers Reporting Company and the above named gentlemen are of the pleasantest and they possess to the fullest degree the confidence of this Board.

Signed by order of the Board, this 6th day of October, 1913.

(Signed) JOHN CASTERA,
President.

This is to certify that the above is a true and correct copy of a motion made at the Directors meeting

of the Merchants & Insurers Reporting Company,
held October 6th, 1913.

(Corporate Seal)

(Signed) H. Y. STANLEY,

Secretary.

Attested.

[Endorsements]: Filed Nov. 12, 1913, at — M.
George W. Lewis, Clerk. By Frank E. McCrary,
Deputy. [6]

**Plaintiff's Exhibit "F" [Minutes of Meeting of
Board of Directors of Bankers' Fire Insurance
Co. Held October 24, 1913].**

MINUTES OF A SPECIAL MEETING OF THE
BOARD OF DIRECTORS OF THE BANK-
ERS FIRE INSURANCE COMPANY, A
CORPORATION OF THE STATE OF ARI-
ZONA, HELD PURSUANT TO A WAIVER
OF NOTICE, AT ROOM 406, FLEMING
BUILDING, PHOENIX, ARIZONA, ON OC-
TOBER 24th, 1913, AT 11:00 O'CLOCK A. M.

Present: Messrs. Civile, Davis and Feldman, be-
ing all of the Directors.

The President, Mr. Civile, was in the chair and
Secretary Davis kept the minutes.

The minutes of the last special meeting were read
and approved.

The Secretary read to the meeting the minutes of
the special meeting of the stockholders held this
morning.

On motion duly seconded, the following resolution
was unanimously adopted:

Resolved: That the appointment of P. H. Hayes as Agent of this corporation, upon whom all process may be served, dated December 28, 1909, and filed and recorded in the office of the Territorial Auditor on the 14th day of January, 1910, and now on file in the office of the Corporation Commission of the State of Arizona, be and the same is hereby revoked and in all things annulled, and further

Resolved: that any and all other appointments of agent or agents in his place, whether now of record or not, be and the same hereby are in all things revoked and annulled, and that the Secretary be authorized and directed to deliver certified copies of this resolution to the said Hayes and to R. C. Stanford, to appoint whom agent in the place of said Hayes an attempt is alleged to have been made by a former Board of Directors, and to the Corporation Commission.

On motion duly seconded, the following preamble and resolutions were unanimously adopted: [7]

Whereas the stockholders of this corporation have this day authorized and directed this Board of Directors, by a vote of a majority of the outstanding stock thereof voting at a special meeting thereof held this day to dissolve or secure the dissolution of this corporation in the most expeditious and economical manner possible and to take all necessary steps to that end, as more fully appears by the minutes of said meeting, therefore

Resolved: That this corporation be dissolved and cease to use or exercise any of its corporate franchises except so far as may be necessary to wind up

its affairs, discharge its obligations and distribute its assets, thereafter remaining, among its stockholders, and further

Resolved: That this Board approves, ratifies and confirms the contract of reinsurance with the "Fireman's Fund" of San Francisco, read to the meeting, and orders a copy thereof spread on the minutes; and further

Resolved: That the proper officers of the company be authorized and instructed to co-operate with the Merchants & Insurers Reporting Company in effecting and securing the dissolution of this company, and if necessary to institute legal proceedings to that end, or to appear in such proceedings as may be instituted by said Merchants & Insurers Reporting Company to that end, by counsel, and facilitate such dissolution as far as possible.

There being no further business, the meeting then adjourned.

(Signed) H. A. DAVIS,
Secretary. [8]

WAIVER OF NOTICE OF MEETINGS OF THE
BOARD OF DIRECTORS OF BANKERS
FIRE INSURANCE COMPANY.

We, the undersigned, being the Board of Directors of the above-named corporation, organized under the laws of the State of Arizona, do hereby waive notice of the time and place of the next special meeting of said Board of Directors, and of the business to be transacted at said meeting.

We designate the 24th day of October, 1913, at

— o'clock in the forenoon as the time, and Room 406 Fleming Building, Phoenix, Arizona, as the place of the said meeting of the said Board of Directors.

And we do hereby waive all requirements of the Laws of the State of Arizona, or of the charter, or By-laws of this Company, both as to notice and as to publication thereof of the time, place and objects of the meeting.

Dated: October 24th, 1913.

(Signed) H. A. DAVIS.

(Signed) C. S. FELDMAN.

(Signed) LEROY H. CIVILLE.

[Endorsements]: Filed Nov. 12, 1913, at — M. George W. Lewis, Clerk. By Frank E. McCrary, Deputy. [9]

Plaintiff's Exhibit "G" [Minutes of Meeting of Stockholders of Bankers' Fire Insurance Co., Held October 24, 1913].

MINUTES OF A SPECIAL MEETING OF THE STOCKHOLDERS OF THE BANKERS FIRE INSURANCE COMPANY, A CORPORATION OF THE STATE OF ARIZONA, HELD PURSUANT TO WAIVER OF NOTICE, AT ROOM 406, FLEMING BUILDING, PHOENIX, ARIZONA, ON THE 24th DAY OF OCTOBER, 1913, AT 10 O'CLOCK A. M.

Present: Merchants & Insurers Reporting Company by

12 *Merchants & Insurers' Reporting Co. et al.*

Leroy H. Civile, proxy, holding 1996 shares

Leroy H. Civile, in person 1 “

H. A. Davis, in person 1 “

C. S. Feldmann, in person 1 “

The meeting was called to order by the President, Mr. Civile, and Secretary Davis kept the minutes.

The President stated that the object of the meeting was to consider the advisability of dissolving the corporation and directing the directors and officers to take such steps as may be necessary to that end.

After discussion, the following preambles and resolutions were offered by Mr. Feldmann and seconded by Mr. Davis and unanimously carried:

Whereas, it is the desire of the Merchants & Insurers Reporting Company, which is the holder and owner of practically all of the stock of this corporation, that this corporation be dissolved and *case* to use and exercise its corporate franchises, and,

Whereas, at a meeting of the stockholders of said Merchants & Insurers Reporting Company, duly called and held in the city of Los Angeles on October 18, 1913, at which more than three-fourths of the outstanding stock was present in person or by proxy and voting, it was unanimously voted that the directors of said Merchants & Insurers Reporting Company should proceed at once to take the necessary steps in connection with this company to dissolve this company and wind up its business and affairs, and

Whereas, pursuant to said resolution, the officers of said Merchants & Insurers Reporting Company acting in conjunction with the President of this company have effected a [10] preliminary contract of

reinsurance with the Fireman's Fund of San Francisco whereby said Fireman's Fund agrees to reinsure all outstanding risks of this company, therefore,

Be it resolved: That this corporation be dissolved as speedily as possible, and further,

Resolved: That this corporation *case* to use or exercise its corporate franchises, and further

Resolved: That the directors and officers be and they hereby are authorized and directed to dissolve or secure the dissolution of this corporation in the most expeditious and economical manner possible, and further

Resolved: That the directors and officers are hereby instructed and authorized to take all necessary steps to carry into effect the said preliminary contract of reinsurance and to discharge all the existing indebtedness and obligations of this corporation and to distribute the assets thereof, which shall be thereafter remaining, in accordance with law and the directions of any court of competent jurisdiction in which the necessary proceedings for final dissolution shall or may be instituted.

There being no further business, the meeting then adjourned.

(Signed) H. A. DAVIS,

Secretary. [11]

WAIVER OF NOTICE OF MEETINGS OF THE
STOCKHOLDERS OF BANKERS FIRE
INSURANCE COMPANY.

We, the undersigned, being all the Stockholders of the above-named corporation, organized under the

14 *Merchants & Insurers' Reporting Co. et al.*

laws of the State of Arizona, do hereby waive notice of the time and place of the next special meeting of said Stockholders, and of the business to be transacted at said meeting.

We designate the 24th day of October, 1913, at — o'clock in the forenoon as the time, and Room 406 Fleming Building, Phoenix, Arizona, as the place of the said meeting of the said Stockholders.

And we do hereby waive all requirements of the Laws of the State of Arizona, or of the charter, or By-laws of this Company, both as to notice and as to publication thereof the *the* time, place and objects of the meeting.

Dated: October 24th, 1913.

(Signed) H. A. DAVIS.

(Signed) C. S. FELDMANN.

(Signed) LEROY H. CIVILLE.

(Signed) MERCHANTS & INSURERS
REPORTING COMPANY,

By LEROY H. CIVILLE,

Proxy.

[Endorsements]: Filed Nov. 12, 1913 at — M.
George W. Lewis, Clerk. By Frank E. McCrary,
Deputy. [12]

**Plaintiff's Exhibit "H" [Minutes of Meeting of
Stockholders of Phoenix Fire Underwriters,
Held October 24, 1913].**

MINUTES OF A SPECIAL MEETING OF THE
STOCKHOLDERS OF THE PHOENIX
FIRE UNDERWRITERS, A CORPORA-
TION OF THE STATE OF ARIZONA, HELD
PURSUANT TO WAIVER OF NOTICE,
AT ROOM 406, FLEMING BUILDING,
PHOENIX, ARIZONA, ON THE 24th DAY
OF OCTOBER, 1913, AT 10 O'CLOCK A. M.

Present: Merchants & Insurers Reporting Com-
pany by

Leroy H. Civile, proxy, holding 1996 shares.

Leroy H. Civile, in person, 1 “

H. A. Davis, in person, 1 “

C. S. Feldman, in person, 1 “

The meeting was called to order by the President,
Mr. Civile, and Secretary Davis kept the minutes.

The President stated that the object of the meeting
was to consider the advisability of dissolving the cor-
poration and directing the directors and officers to
take such steps as may be necessary to that end.

After discussion, the following preambles and reso-
lutions were offered by Mr. Feldmann and seconded
by Mr. Davis and unanimously carried:

Whereas, it is the desire of the Merchants & In-
surers Reporting Company, which is the holder and
owner of practically all of the stock of this corpora-
tion, that this corporation be dissolved and *case* to
use and exercise its corporate franchises, and,

16 *Merchants & Insurers' Reporting Co. et al.*

Whereas, at a meeting of the stockholders of said Merchants & Insurers Reporting Company, duly called and held in the city of Los Angeles on October 18, 1913, at which more than three-fourths of the outstanding stock was present in person or by proxy and voting, it was unanimously voted that the directors of said Merchants & Insurers Reporting Company should proceed at once to take the necessary steps in connection with this company to dissolve this company and wind up its business and affairs, and

Whereas, pursuant to said resolution, the officers of said Merchants & Insurers Reporting Company acting in conjunction with the President of this company have effected a [13] preliminary contract of reinsurance with the Fireman's Fund of San Francisco whereby said Fireman's Fund agrees to reinsure all outstanding risks of this company, therefore,

Be it resolved: That this corporation be dissolved as speedily as possible, and further,

Resolved: That this corporation cease to use or exercise its corporate franchises, and further

Resolved: That the directors and officers be and they hereby are authorized and directed to dissolve or secure the dissolution of this corporation in the most expeditious and economical manner possible, and further

Resolved: That the directors and officers are hereby instructed and authorized to take all necessary steps to carry into effect the said preliminary contract of reinsurance and to discharge all the existing indebtedness and obligations of this corporation and to

distribute the assets thereof, which shall be thereafter remaining, in accordance with law and the directions of any court of competent jurisdiction in which the necessary proceedings for final dissolution shall or may be instituted.

There being no further business, the meeting then adjourned.

(Signed) H. A. DAVIS,
Secretary. [14]

WAIVER OF NOTICE OF MEETINGS OF THE
STOCKHOLDERS OF PHOENIX FIRE
UNDERWRITERS.

We, the undersigned, being all the Stockholders of the above-named corporation, organized under the laws of the State of Arizona, do hereby waive notice of the time and place of the next special meeting of said Stockholders, and of the business to be transacted at said meeting.

We designate the 24th day of October, 1913, at — o'clock in the forenoon as the time, and Room 406 Fleming Building, Phoenix, Arizona, as the Place of the said meeting of the said Stockholders.

And we do hereby waive all requirements of the Laws of the State of Arizona, or of the charter, or By-laws of this Company, both as to notice and as to publication thereof the *the* time, place and objects of the meeting.

Dated: October 24th, 1913.

(Signed) H. A. DAVIS.

(Signed) C. S. FELDMANN.

(Signed) LEROY H. CIVILLE.

(Signed) MERCHANTS & INSURERS
REPORTING COMPANY,

By LEROY H. CIVILLE,

Proxy.

[Endorsements]: Filed Nov. 12, 1913, at — M.
George W. Lewis, Clerk. By Frank E. McCrary,
Deputy. [15]

**Plaintiff's Exhibit "I" [Minutes of Meeting of
Board of Directors of Phoenix Fire Under-
writers Held October 24, 1913].**

MINUTES OF A SPECIAL MEETING OF THE
BOARD OF DIRECTORS OF THE PHOE-
NIX FIRE UNDERWRITERS, A COR-
PORATION OF THE STATE OF ARIZONA,
HELD PURSUANT TO A WAIVER OF
NOTICE, AT ROOM 406, FLEMING BUILD-
ING, PHOENIX, ARIZONA, ON OCTOBER
24th, 1913, AT 11:00 O'CLOCK A. M.

Present: Messrs. Civile, Davis and Feldman, be-
ing all of the Directors.

The President, Mr. Civile, was in the chair and
Secretary Davis kept the minutes.

The minutes of the last special meeting were read
and approved.

The Secretary read to the meeting the minutes of
the special meeting of the stockholders held this
morning.

On motion duly seconded, the following resolution was unanimously adopted:

Resolved: That the appointment of P. H. Hayes as Agent of this Corporation, upon whom all process may be served, dated December 28, 1909, and filed and recorded in the office of the Territorial Auditor on the 14th day of January, 1910, and now on file in the office of the Corporation Commission of the State of Arizona, be and the same is hereby revoked and in all things annulled, and further

Resolved: that any and all other appointments of agent or agents in his place, whether now of record or not, be and the same hereby are in all things revoked and annulled, and that the Secretary be authorized and directed to deliver certified copies of this resolution to the said Hayes and to R. C. Stanford, to appoint whom agent in the place of said Hayes an attempt is alleged to have been made by a former Board of Directors, and to the Corporation Commission.

On motion duly seconded, the following preamble and resolutions were unanimously adopted: [16]

Whereas the stockholders of this corporation have this day authorized and directed this Board of Directors, by a vote of a majority of the outstanding stock thereof voting at a special meeting thereof held this day to dissolve or secure the dissolution of this corporation in the most expeditious and economical manner possible and to take all necessary steps to that end, as more fully appears by the minutes of said meeting, therefore

Resolved: That this corporation be dissolved and

cease to use or exercise any of its corporate franchises except so far as may be necessary to wind up its affairs, discharge its obligations and distribute its assets, thereafter remaining, among its stockholders, and further

Resolved: That this Board approves, ratifies and confirms the contract of reinsurance with the "Fireman's Fund" of San Francisco, read to the meeting, and orders a copy thereof spread on the minutes; and further

Resolved: That the proper officers of the company be authorized and instructed to co-operate with the Merchants & Insurers Reporting Company in effecting and securing the dissolution of this company, and if necessary to institute legal proceedings to that end, or to appear in such proceedings as may be instituted by said Merchants & Insurers Reporting Company to that end, by counsel, and facilitate such dissolution as far as possible.

There being no further business, the meeting then adjourned.

(Signed) H. A. DAVIS,

Secretary. [17]

WAIVER OF NOTICE OF MEETINGS OF THE
BOARD OF DIRECTORS OF PHOENIX
FIRE UNDERWRITERS.

We, the undersigned, being the Board of Directors of the above-named corporation, organized under the laws of the State of Arizona, do hereby waive notice of the time and place of the next special meeting of said Board of Directors, and of the business to be transacted at said meeting.

We designate the 24th day of October, 1913, at — o'clock in the forenoon as the time, and Room 406, Fleming Building, Phoenix, Arizona, as the place of the said meeting of the said Board of Directors.

And we do hereby waive all requirements of the Laws of the State of Arizona, or of the charter, or By-laws of this Company, both as to notice and as to publication thereof of the time, place and objects of the meeting.

Dated: October 24th, 1913.

(Signed) H. A. DAVIS.

(Signed) C. S. FELDMAN.

(Signed) LEROY H. CIVILLE.

[Endorsements]: Filed Nov. 12, 1913 at — M. George W. Lewis, Clerk. By Frank E. McCrary, Deputy. [18]

**[Minutes of Court—November 25, 1913—Order
Dismissing Application for Authority to Con-
summate Contract for Reinsurance, etc.]**

*In the United States District Court for the District
of Arizona.*

MINUTE ENTRY APPEARING UNDER DATE
OF NOVEMBER 25, 1913.

E—14.

MERCHANTS & INSURERS' REPORTING CO.,
Complainant,

vs.

PHOENIX FIRE UNDERWRITERS,
Defendant.

The application of the complainant, dated November 21st, 1913, for authority to consummate the contract for reinsurance heretofore made and to distribute amongst the defendant's stockholders all of defendant's assets saving only such sum as the Court may deem to be sufficient to discharge all outstanding and unpaid debts of defendant, together with all costs and expenses of this suit including counsel fees, having been argued by counsel and submitted to the Court for its decision, it is ordered that the said application be and the same is hereby dismissed without prejudice. [19]

[Minutes of Court—December 13, 1913—Order
Setting Cause for Hearing].

*In the United States District Court for the District
of Arizona.*

MINUTE ENTRY APPEARING UNDER DATE
OF DECEMBER 13th, 1913.

No. E.—14.

MERCHANTS & INSURERS' REPORTING CO.,
Complainant,

vs.

PHOENIX FIRE UNDERWRITERS,
Defendant.

IT IS ORDERED that this case be set for hearing on December 20th, 1913, on the petition of F. A. Jones, to intervene. [20]

**[Minutes of Court—December 20, 1913—Order
Granting Leave to F. A. Jones, to Intervene,
etc.]**

*In the United States District Court for the District
of Arizona.*

MINUTE ENTRY APPEARING UNDER DATE
OF DECEMBER 20, 1913.

No. E.—14.

MERCHANTS & INSURERS' REPORTING CO.,
Complainant,

vs.

PHOENIX FIRE UNDERWRITERS,
Defendant.

IT IS ORDERED that leave be given to counsel
for the petitioner to intervene herein to file the
amended petition of F. A. Jones, praying for leave
to intervene in this cause. [21]

**[Minutes of Court—April 6, 1914—Order Setting
Cause for Hearing on April 8, 1914.]**

*In the United States District Court for the District
of Arizona.*

MINUTE ENTRY APPEARING UNDER DATE
OF APRIL 6th, 1914.

No. E.—14.

MERCHANTS & INSURERS' REPORTING CO.,
Complainant,

vs.

PHOENIX FIRE UNDERWRITERS,
Defendant.

IT IS ORDERED that this case be set for hearing on April 8, 1914, at two o'clock P. M. [22]

**[Minutes of Court—April 8, 1914—Order Granting
Leave to File Petition for Intervention, etc.]**

*In the United States District Court for the District
of Arizona.*

MINUTE ENTRY APPEARING UNDER DATE
OF APRIL 8th, 1914.

No. E.—14.

MERCHANTS & INSURERS' REPORTING CO.,
Plaintiff,

vs.

PHOENIX FIRE UNDERWRITERS,
Defendant.

On this day came the plaintiff, by Messrs. Struckmeyer and Jenckes, its attorneys, and the defendant, by Messrs. W. M. Seabury and James Westervelt, its attorneys, and the intervenors, by Reese Ling, Esquire; and the demurrer of the defendant to the petition for intervention was argued by counsel and submitted to the Court for its decision, and the said demurrer was overruled by the Court and the petitioners were permitted to file their petition for intervention herein;

AND IT IS ORDERED that the petitioners be permitted to file their petition for intervention herein;

AND IT IS FURTHER ORDERED that the intervenors be permitted to file affidavits within five

days of this date in support of their application for a Receiver herein and that the plaintiff and defendant herein be given five days thereafter within which to file their affidavits in opposition to the appointment of a receiver herein, and that the intervenors shall then have two days' additional time within which to file their reply affidavits herein, to all of which orders of the Court the plaintiff and defendant, by counsel, excepted and asked that their exception be noted upon the records and the same is accordingly done [23]

*In the United States District Court for the District
of Arizona.*

No. E.—14.

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

PHOENIX FIRE UNDERWRITERS,

Defendants.

Stipulation [Re Use of Certain Affidavits, etc.].

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the complainant and defendant and for the intervenors that the affidavit filed and served on behalf of intervenors in this court in Cause No. E.—15, to wit, Merchants & Insurers' Reporting Company, complainant, vs. Bankers' Fire Insurance Company, defendant, pursuant to the order of this Court entered April 8, 1914, and such affidavits as may be hereafter filed and served pursuant to said order in

said cause by any of the parties hereto, may be used in this cause as though filed and served herein; and further that either party hereto may use said affidavits upon any appeal from any order or decree of this court entered herein; and further that upon any appeal by any party hereto from any such order or decree entered herein, in case an appeal is taken from a similar order or decree entered in the aforesaid cause, Merchants & Insurers' Reporting Company vs. Bankers Fire Insurance Company, the record in said cause may be used upon the appeal in this cause, it being the intention that but one set of appeal papers need be prepared by any of the parties to such appeals and that the decision upon the appeal in said cause No. E.—15, to wit, Merchants & Insurers' Reporting Company [24] vs. Bankers' Fire Insurance Company, will be deemed and held to be the decision upon the appeal from the order or decree entered in this cause.

It is further agreed that the undersigned will execute any and all additional stipulations that may be necessary to carry this stipulation into effect.

(Signed) F. C. STRUCKMEYER, Jr.,

JOS. G. JENCKES,

Solicitors for Complainant.

RICHARD E. SLOAN,

W. M. SEABURY,

JAMES WESTERVELT,

Solicitors for Defendant.

GEORGE J. STONEMAN,

REESE M. LING,

Solicitors for Intervenors.

[Endorsements]: E.—14. In the United States District Court for the District of Arizona. Merchants & Insurers' Rep. Co. vs. Phoenix Fire Underwriters. Stipulation. File Apr. 20, 1914, Geo. W. Lewis, Clerk. By R. E. L. Webb, Dep. [25]

[Minutes of Court—April 25, 1914—Order Overruling Demurrer, etc.]

In the United States District Court for the District of Arizona.

MINUTE ENTRY APPEARING UNDER DATE
OF APRIL 25th, 1914.

No. E.—14.

MERCHANTS & INSURERS' REPORTING CO.,
Plaintiff,

vs.

PHOENIX FIRE UNDERWRITERS,
Defendant.

The demurrers heretofore filed herein are hereby overruled and the cause is submitted to the Court for its decision and judgment upon the pleadings, petitions and affidavits of the parties hereto and the intervenors herein. [26]

*In the United States District Court for the District
of Arizona.*

E.—14.

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

PHOENIX FIRE UNDERWRITERS,

Defendant.

Order Appointing Receiver.

This cause coming on to be heard on the 1st day of July, 1914, the same being a day of the regular April term of this Court, upon the verified petition for intervention of F. A. Jones, as a stockholder of the above-named defendant, for himself and all other stockholders of the defendant, and the demurrer of the defendant to such petition and upon the hearing of the argument of the counsel representing the respective parties in support of said petition for intervention and said demurrer, the same being by the Court considered, and the demurrer being by the Court overruled, and upon the hearing of the motion of the defendant to dismiss said petition for intervention, and the answer of the defendant thereto, and after hearing evidence both oral and documentary in support of the said petition for intervention, and against the same, and the argument of counsel, and fully considering the same, it was by the Court ordered, adjudged and decreed that said petition for intervention should

be allowed and the prayer thereof should be granted, and it appearing that it is necessary and proper that a receiver be appointed for the said defendant, Phoenix Fire Underwriters, and that said Receiver be authorized, directed and empowered to do and perform all such acts as may be necessary and proper to be done for the purpose of caring for and conserving the assets [27] of defendant, wherever the same may be found, taking the same into his possession, and the winding up of the affairs of said defendant, and the returning of all said assets into this court, and that the defendant and each and all of its officers, agents and attorneys and employees be restrained until the further order of this Court from the doing and performing of any act or acts in the management, operation or control of the defendant as may in any manner defeat or impair the rights of the defendant or said petitioner in intervention, and from in any manner doing any further business except such as may be done by said receiver and pursuant to the authority herein conferred, and under the direction of the further orders of this Court.

IT IS NOW THEREFORE FURTHER ORDERED, ADJUDGED AND DECREED that Lysander Cassidy, a resident of Phoenix, in the State of Arizona be and he is hereby appointed as Receiver of said defendant, Phoenix Fire Underwriters, upon his qualifying and the giving of a bond in the sum of Three Thousand (\$3000.00) Dollars, with full power and authority to do any and all of the acts necessary in the premises for the

full and complete performance of this order and subject to the further orders and rules of this Court in the premises.

Done in Open Court this 1st day of July, 1914.

WM. H. SAWTELLE,
United States District Judge.

[Endorsements]: E.—14. In the United States District Court for the District of Arizona. Merchants & Insurers' Reporting Company, Complainant, vs. Phoenix Fire Underwriters, Defendant. Order Appointing Receiver. Filed Jul. 1, 1914 at —M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [28]

*District Court of the United States, District of
Arizona.*

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

PHOENIX FIRE UNDERWRITERS,

Defendant.

Notice of Appeal.

F. A. Jones filed his amended petition for leave to intervene in the above-entitled cause, on or about December 20, 1913, and having on or about said date moved this Court for leave to intervene in said cause, the said Court having on or about the 8th day of April, 1914, granted said relief, and entered an order herein as of said date overruling the de-

murrer to said amended petition and permitting said F. A. Jones to intervene herein and on or about the 25th day of April, 1914, the said Court having overruled the demurrer of the complainant and defendant to the petition in intervention of said F. A. Jones herein by order entered as of said date, and said Court having on the first day of July, 1914, appointed, on the motion of said F. A. Jones, a receiver herein by order entered as of said date.

NOW, THEREFORE, come the said Merchants & Insurers' Reporting Company and the Phoenix Fire Underwriters and hereby appeal from the said order of April 8, 1914, from said order of April 25, 1914, and from said order of July 1, 1914, so made and entered as aforesaid, and also from each and every part thereof, to the Circuit Court of Appeals in and for the 9th Circuit. [29]

Dated, Phoenix, Arizona, this 21 day of July, 1914.

F. C. STRUCKMEYER,
JOS. S. JENCKES,

Solicitors for Merchants & Insurers' Reporting
Company.

RICHARD E. SLOAN,
W. M. SEABURY,
JAMES WESTERVELT,

Solicitors for Phoenix Fire Underwriters. [30]

[Endorsements]: District Court of U. S. District of Arizona. Merchants & Insurers' Reporting Company vs. Phoenix Fire Underwriters. Notice of Appeal. Filed Jul. 10, 1914, at —M. George

W. Lewis, Clerk. By R. E. L. Webb, Deputy.
[31]

*District Court of the United States, District of
Arizona.*

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

PHOENIX FIRE UNDERWRITERS,

Defendant.

Petition for Order Allowing Appeal.

To the Honorable WILLIAM H. SAWTELLE,
Judge of the District Court in and for the Dis-
trict of Arizona:

The above-named, Merchants & Insurers' Re-
porting Company and Phoenix Fire Underwriters,
respectively, complainant and defendant herein, feel-
ing themselves aggrieved by the order of this Honor-
able Court made and entered herein on April 8, 1914,
whereby the demurrer to the amended petition of
F. A. Jones for leave to intervene herein was over-
ruled and said F. A. Jones was allowed to intervene
here by the order made and entered herein on April
25, 1914, whereby the demurrer of complainant and
defendant to the petition in intervention herein of
said F. A. Jones was overruled and by the order made
and entered herein on July 1st, 1914, whereby Lysan-
der Cassidy, Esq., of Phoenix, Arizona, was ap-
pointed receiver of said Phoenix Fire Underwriters,
do hereby appeal from said orders of April 8, 1914,

April 20, 1914, and July 1, 1914, and each and every part of each of said orders to the Circuit Court of Appeals in and for the 9th Judicial Circuit for the reason specified in the assignment of errors, which is filed herein and your petitioner prays that its appeal be allowed and that such citation issue as is provided by law [32] and that a transcript of the records, proceedings and papers upon which said order of April 8, 1914, said order of April 25, 1914, and said order of July 1, 1914, were based, duly authenticated may be sent to the United States Circuit Court of Appeals in and for the 9th Judicial Circuit, sitting at the City of San Francisco, State of California, and your petitioner further prays that the proper order touching the security required by them to perfect their said appeal herein be made, and desiring to supersede the execution of said order of July 1, 1914, petitioners here tender bond in such amount as the court may require for such purpose and pray that with the allowance of the appeal a supersedeas be issued.

F. C. STRUCKMEYER,
JOS. S. JENCKES,

Solicitors for Merchants & Insurers' Reporting
Company.

RICHARD E. SLOAN,
W. M. SEABURY,
JAMES WESTERVELT,

Solicitors for Phoenix Fire Underwriters. [33]

[Endorsements]: District Court of U. S., District of Arizona. Merchants & Insurers' Reporting Company vs. Phoenix Fire Underwriters. Petition

for an Order Allowing Appeal. Filed Jul. 10, 1914,
at — M. George W. Lewis, Clerk. By R. E. L.
Webb, Deputy. [34]

*District Court of the United States, District of
Arizona.*

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

PHOENIX FIRE UNDERWRITERS,

Defendant.

**Order Allowing Appeal and Fixing Amount of
Supersedeas Bond.**

It is hereby ordered that an appeal in the above-entitled cause to the Circuit Court of Appeals of the 9th Circuit be and is hereby allowed as prayed and that it operate as a supersedeas, and that the order of the District Court of the United States for the District of Arizona herein dated the first day of July, 1914, be, and it is hereby superseded pending said appeal and until the same is finally heard and determined upon the appellant's Merchants & Insurers' Reporting Company and Phoenix Fire Underwriters, filing a bond in the sum of Two Thousand Dollars, with sufficient surety, conditioned as required by law, and that if the said Merchants & Insurers' Reporting Company and Phoenix Fire Underwriters, do prosecute the same to effect, and if they fail to make their appeal good, shall pay and answer all damages, costs, charges and interest in the

said cause, then the said obligation to be void.

Done in open court this 22d day of July, 1914.

WM. H. SAWTELLE,

Judge of the District Court of the United States for
the District of Arizona. [35]

[Endorsements]: E.—14. District Court of U. S.,
District of Arizona, Merchants & Insurers' Re-
porting Company vs. Phoenix Fire Underwriters.
Order Allowing Appeal and Fixing Amount of
Supersedeas Bond. Filed Jul. 23, 1914, at — M.
George W. Lewis, Clerk. By R. E. L. Webb, Deputy:
[36]

*District Court of the United States, District of
Arizona.*

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

PHOENIX FIRE UNDERWRITERS,

Defendant.

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we Merchants & Insurers' Reporting Company
and Phoenix Fire Underwriters, as principals, and
National Surety Company, a corporation, organized
and existing under and by virtue of the laws of the
State of New York, and authorized to do business
as a Surety Company in the State of Arizona, as
surety, acknowledge ourselves to be indebted jointly
and severally to F. A. Jones, Esq., and to Lysander

Cassidy, Esq., as Receiver of the Phoenix Fire Underwriters, for the benefit of said Jones and such other stockholders of Merchants & Insurers' Reporting Company as may be damaged by the pendency of the appeal hereinafter described, in the full sum of Two Thousand (\$2,000.00) Dollars, conditioned that,

WHEREAS, on or about the 8th day of April, 1914, in the District Court of the United States for the District of Arizona, in an issue pending in that court wherein Merchants & Insurers' Reporting Company was complainant and the Phoenix Fire Underwriters was defendant, an order was entered overruling the demurrer to the amended petition of said F. A. Jones for leave to intervene herein and granting to said F. A. Jones leave to intervene in said cause; and [37]

WHEREAS, on or about the 25th day of April, 1914, in said District Court of the United States for the District of Arizona, in said cause an order was entered overruling the demurrers of the complainant and defendant to the petition of intervention herein of said F. A. Jones; and

WHEREAS, on or about the first day of July, 1914, in said District Court of the United States for the District of Arizona, in said suit, and order was entered appointing Lysander Cassidy receiver of the said Phoenix Fire Underwriters and the said Merchants & Insurers' Reporting Company having obtained an appeal to the Circuit Court of Appeals in and for the 9th Judicial Circuit from the said order of April 8, 1914, said order of April 25th, 1914, and

said order of July 1st, 1914, which has been duly filed in the office of the clerk of the court to reverse the said orders and a citation directed to the said F. A. Jones, Esq., and the said Lysander Cassidy, Esq., as receiver of the Phoenix Fire Underwriters, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit to be holden in the City of San Francisco within thirty days of the date of said citation:

Now, if the said Merchants & Insurers' Reporting Company and Phoenix Fire Underwriters shall prosecute their appeal to effect and if they shall fail to make good said appeal and to obtain the reversal of the several orders appealed from, shall answer and pay to the obligees in this bond all damages which they may sustain by reason of the suspension of said orders and stay of proceedings thereon and costs of this appeal, then the above obligation to be void, otherwise to remain in full force and virtue.

[38]

And said bond and obligation is upon the further express condition and agreement by the sureties thereto, that in case of a breach of the condition set forth herein, this Court may, upon notice to said sureties of not less than ten days, proceed summarily in said action or suit in which this bond is given to ascertain the amount which said sureties are bound to pay on account of such breach of said bond and undertaking, and render judgment against the said

sureties and each of them and award execution thereon.

MERCHANTS & INSURERS' REPORTING CO.,

By JOHN CASTERA,

President.

PHOENIX FIRE UNDERWRITERS,

By LEROY H. CIVILLE,

President.

NATIONAL SURETY COMPANY,

By CATESBY C. THOM.

Approved as to form and sufficiency of the surety this 25 day of July, 1914.

WM. H. SAWTELLE,

Judge of the District Court of the United States for
the District of Arizona. [39]

State of California,

County of Los Angeles,—ss.

On this 31 day of July, in the year one thousand nine hundred and fourteen, before me, William M. Curran, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Catesby C. Thom, known to me to be the duly authorized attorney in fact of National Surety Company, and the same person whose name is subscribed to the within instrument as the attorney in fact of said company, and the said Catesby C. Thom, acknowledged to me that he subscribed the name of National Surety Company thereto as principal, and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed my official seal the day and year in this certificate first above written.

[Notarial Seal]

(Signed) WILLIAM M. CURRAN,
Notary Public in and for Los Angeles County, State
of California. [40]

[Endorsements]: District Court of U. S., District
of Arizona. Merchants & Insurers' Reporting Com-
pany vs. Phoenix Fire Underwriters. Supersedeas
Bond. Filed Aug. 26, 1914, at — M. George W.
Lewis, Clerk. By R. E. L. Webb, Deputy. [41]

*In the United States District Court for the District
of Arizona.*

No. E.—14 (Phoenix).

MERCHANTS & INSURERS' REPORTING
COMPANY,

Plaintiff,

vs.

PHOENIX FIRE UNDERWRITERS,

Defendant.

F. A. JONES,

Intervenor.

**Stipulation [Enlarging Time to File Record, etc.,
in Appellate Court to September 8, 1914].**

It is hereby agreed and stipulated that an order
nunc pro tunc be entered by the Court of August 22d,
1914, enlarging the time within which the original
certified Transcript of the Record in the above-
entitled cause may be filed, and within which the
cause may be docketed with the Clerk of the United

States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, to and including the 8th day of September, A. D. 1914.

GEORGE J. STONEMAN,

REESE M. LING,

Attorneys for Intervenor.

R. E. SLOAN,

JAMES WESTERVELT,

Attorneys for Defendant.

Dated at Phoenix, Arizona, this 28th day of August, A. D. 1914. [42]

[Endorsements]: No. E.—14 (Phoenix). In the United States District Court for the District of Arizona. Merchants & Insurers' Reporting Co., Plaintiff, vs. Phoenix Fire Underwriters, Defendant. F. A. Jones, Intervenor. Stipulation Agreeing to the Enlargement of Time Within Which to File Transcript of Record. Filed Aug. 28, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [43]

In the United States District Court for the District of Arizona.

No. E.—14 (Phoenix).

MERCHANTS & INSURERS' REPORTING
COMPANY,

Plaintiff,

vs.

PHOENIX FIRE UNDERWRITERS,

Defendant.

F. A. JONES,

Intervenor.

Order Under Rule 16, Section 1, Enlarging Time to September 8, 1914, to File Record Thereof and to Docket Case.

In accordance with a stipulation of counsel herein, filed August 28, 1914, and good cause therefor appearing,—

It is ordered that the time within which the original certified Transcript of the Record in the above-entitled cause may be filed, and within which the cause may be docketed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be, and hereby is enlarged to and including the 8th day of September, A. D. 1914, and that this order be now entered of record as of and for the 22d day of August, A. D. 1914.

(Signed) WM. H. SAWTELLE,
Judge of the United States District Court for the District of Arizona.

Dated at Tucson, Arizona, this 29th day of August, A. D. 1914. [44]

[Endorsements]: No. E.—14 (Phoenix). In the United States District Court for the District of Arizona. Merchants & Insurers' Reporting Co., Plaintiff, vs. Phoenix Fire Underwriters, Defendant. F. A. Jones, Intervenor. Order Enlarging Time Within Which to File Transcript of Record. Filed Aug. 29, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [45]

*In the United States District Court for the District
of Arizona.*

No. E.—14 (Phoenix).

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

PHOENIX FIRE UNDERWRITERS,

Defendants.

Praecipe for Transcript of Record.

To George W. Lewis, Clerk of said Court:

Kindly prepare, certify and transmit to the Clerk of the Circuit Court of Appeals for the 9th Circuit at San Francisco, California, a typewritten transcript of the record upon appeal in the above-entitled cause containing the following portions of the record in the above-entitled cause, to wit:

Stipulation;

Notice of Appeal;

Petition for an Order Allowing Appeal;

Order Allowing Appeal;

Citation;

Supersedeas Bond;

Praecipe.

R. E. SLOAN,

W. M. SEABURY,

JAMES WESTERVELT,

Attorneys for Defendant. [46]

[Endorsements]: No. E.—14 (Phoenix). In the United States District Court for the District of Arizona. Merchants & Insurers' Reporting Co., Plaintiff, vs. Phoenix Fire Underwriters, Defendant. F. A. Jones, Intervenor. Praecipe for Transcript of Record. Filed Aug. 28, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [47]

*In the United States District Court for the District
of Arizona.*

No. E.—14 (Phoenix).

MERCHANTS & INSURERS' REPORTING
CO.,

Complainant,

vs.

PHOENIX FIRE UNDERWRITERS,

Defendant.

F. A. JONES,

Intervenor.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
District of Arizona,—ss.

I, George W. Lewis, Clerk of the United States District Court, for the District of Arizona, do hereby certify that the forty-seven (47) typewritten pages, numbered from one (1) to forty-seven (47) inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other

proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the judgment of said United States District Court for the District of Arizona, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the defendant for the preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of [48] Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S., as Amended by Sec. 6, Act of March 2, 1905), for making typewritten transcript of record, 105 folios at 20¢ per folio.....	\$21.00
Certificate of Clerk to typewritten transcript of record, 3 folios at 30¢ per folio.....	.90
Seal to said Certificate.....	.40
	<hr/>
	\$22.30

I hereby certify that the above cost for preparing and certifying record, amounting to \$22.30, has been paid to me by Messrs. Richard E. Sloan, Wm. M. Seabury, and James Westervelt, attorneys for the defendant.

I further certify that I hereto attach and here-

with transmit the original Citation, issued in this cause.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the seal of said District Court at Phoenix, in said District, this 3d day of September, A. D. 1914.

[Seal]

GEORGE W. LEWIS,
Clerk.

By Robert E. L. Webb,
Deputy Clerk. [49]

*District Court of the United States, District of
Arizona.*

E—14.

MERCHANTS & INSURERS' REPORTING
COMPANY,

Complainant,

vs.

PHOENIX FIRE UNDERWRITERS,
Defendant.

Citation [on Appeal (Original)].

President of the United States of America, to F. A. Jones, Esq., and Lysander Cassidy, Esq., as Receiver for the Phoenix Fire Underwriters:

You are hereby notified that in a certain case in equity in the United States District Court in and for the District of Arizona, wherein Merchants & Insurers' Reporting Company is complainant, and Phoenix Fire Underwriters is defendant, and F. A. Jones is an intervenor, and wherein Lysander Cassidy, Esq., has been appointed by said court receiver

of said Phoenix Fire Underwriters by order dated July 1, 1914, an appeal has been duly allowed to Merchants & Insurers' Reporting Company and Phoenix Fire Underwriters to the Circuit Court of Appeals in and for the 9th Judicial Circuit. You and each of you are hereby cited and admonished to be and appear in the said court in the city of San Francisco, State of California, within thirty days from the date of this citation to show cause if any there be why the order of April 8, 1914, overruling the demurrer to the amended petition of said F. A. Jones for leave to intervene herein and permitting said F. A. Jones to intervene herein, the order of April 25, 1914, overruling the demurrer of complainant and defendant to the petition in intervention herein of said F. A. Jones, and [50] the order of July 1, 1914, appointing Lysander Cassidy, Esq., as receiver of the Bankers' Fire Insurance Company, each of which is appealed from herein, should not be corrected and speedy justice done to the parties in that behalf.

WITNESS the Honorable WILLIAM H. SAWTELLE, Judge of the United States District Court in and for the District of Arizona, this 22d day of July, 1914.

WM. H. SAWTELLE,
Judge of the United States District Court for the
District of Arizona.

Service accepted Aug. 8, 1914.

GEORGE J. STONEMAN,
REESE M. LING,

Sureties for F. A. Jones, Intervenor. [51]

[Endorsed]: District Court of U. S., District of Arizona. Merchants & Insurers' Reporting Company vs. Phoenix Fire Underwriters. Citation. Filed Jul. 23, 1914, at — M. George W Lewis, Clerk. By R. E. L. Webb, Deputy.

[Endorsed]: No. 2476. United States Circuit Court of Appeals for the Ninth Circuit. Merchants & Insurers' Reporting Company, a Corporation, and Phoenix Fire Underwriters, a Corporation, Appellants, vs. F. A. Jones, Intervenor, and Lysander Cassidy, as Receiver of the Phoenix Fire Underwriters, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Received and filed September 5, 1914.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

MERCHANTS & INSURERS' REPORTING COMPANY, a Corporation, and BANKERS' FIRE INSURANCE COMPANY, a Corporation,

Appellants,

vs.

F. A. JONES, Intervener, and LYSANDER CASSIDY, as Receiver of the BANKERS' FIRE INSURANCE COMPANY, a Corporation,

Appellees.

No. 2477

MERCHANTS & INSURERS' REPORTING COMPANY, a Corporation, and PHOENIX FIRE UNDERWRITERS, a Corporation,

Appellants,

vs.

F. A. JONES, Intervener, and LYSANDER CASSIDY, as Receiver of the PHOENIX FIRE UNDERWRITERS, a Corporation,

Appellees.

No. 2476

Appellant's Brief

MARSHALL STIMSON,
Los Angeles, California.

F. C. STRUCKMEYER,
JOS. A. JENCKES,
Phoenix, Arizona

Solicitors for Complainant.

RICHARD E. SLOAN,
WILLIAM M. SEABURY,
JAMES WESTERVELT,
Phoenix, Arizona.

Solicitors for Defendants.

Filed

OCT 5 - 1914

F. D. Monckton,
Clerk.

*United States Circuit Court of Appeals for the Ninth
Circuit.*

MERCHANTS & INSURERS' RE-
PORTING COMPANY, a Corpora-
tion, and BANKERS' FIRE IN-
SURANCE COMPANY, a Corpora-
tion,

Appellants,

vs.

F. A. JONES, Intervener, and LYSAN-
DER CASSIDY, as Receiver of the
BANKERS' FIRE INSURANCE
COMPANY, a Corporation,

Appellees.

No. 2477

MERCHANTS & INSURERS' RE-
PORTING COMPANY, a Corpora-
tion, and PHOENIX FIRE UN-
DERWRITERS, a Corporation,

Appellants,

vs.

F. A. JONES, Intervener, and LYSAN-
DER CASSIDY, as Receiver of the
PHOENIX FIRE UNDERWRIT-
ERS, a Corporation,

Appellees.

No. 2476

APPELLANTS' BRIEF.

Appellants respectfully move to consolidate Cause
No. 2476 and Cause No. 2477 and to be permitted to
submit the following brief in support of the appeals

taken in each case. By stipulation of counsel the decision in one case shall be binding in the other. The facts with reference to each defendant are practically identical (R. 2476, p. 25).

The complainant and defendants, Phoenix Fire Underwriters and Bankers' Fire Insurance Company, appeal jointly from orders of the District Court of the District of Arizona, dated July 1, 1914, appointing a receiver of the Phoenix Fire Underwriters and the Bankers' Fire Insurance Company.

FACTS.

The Merchants & Insurers' Reporting Company, a California corporation, instituted two actions on the Equity side of the Court below, one to dissolve the Phoenix Fire Underwriters, an Arizona corporation, and the other to dissolve the Bankers' Fire Insurance Company, another Arizona corporation. Federal jurisdiction in each case depended upon diversity of citizenship and involved the requisite amount. No question exists with reference thereto.

It appeared that the plaintiff company owned all of the stock of both defendant companies; that the defendant had practically no debts and that they had re-insured all of the outstanding insurance amounting to about one million dollars, and that the defendant com-

panies were the legal owners of assets, most of which consisted of mortgages and negotiable investments enforceable against residents of California, the collection of which was embarrassed by the legal ownership thereof by the defendants when in reality the complainant was the beneficial owner of the assets, and inasmuch as the defendant companies had no excuse for continued existence and the nature of their assets made their continued existence and operation as insurance companies a public menace, the complainant desired to have them dissolved and their assets legally transferred to the complainant.

The defendant companies endeavored in every way to facilitate their own dissolution and acted in perfect accord and harmony with the complainant company. Consequently, when the complainant filed the bills for dissolution of both companies on October 25, 1913, the defendants voluntarily appeared and answered, admitting all the allegations of the bill and joined in the complainant's prayer for relief.

The cause was tried Nov. 12, 1913, and all the allegations of the bill were duly proved (R. 2476, p. 1-20). The complainant prayed that for the purpose of dissolution the directors of the defendants might be constituted trustees (R. 2477, p. 9) under such bond as the court might impose and supplemented this request with resolutions of its directors expressing the fullest confidence in the officers of the defendants (R. 2476, p. 7).

The directors of the defendants offered to serve as such trustees under any bond the court might fix and without compensation.

We fail to find the court's oral comment in the record, but we are confident it will not be denied that at this juncture the court expressed the view *sua sponte* that a receiver ought to be appointed.

It does appear that after the reception of the evidence the court took the matter under advisement until a future day (R. 2476, p. 1), R. 2477, p. 13).

There was no issue of fact or of law between the complainant and the defendant. There was nothing to take under advisement except the request of both parties that the directors of the defendant be permitted to serve as trustees for purposes of dissolution.

On December 13, 1913, an order was made setting for hearing the application of F. A. Jones for leave to intervene (R. 2477, p. 15), and on December 20, 1913, Jones was permitted to file an amended petition for leave to intervene (R. 2477, p. 15).

The amended petition of Jones filed on Dec. 20, 1913, alleged in substance (R. 2477, p. 16-27) that Jones was a stockholder to the extent of 50 shares in the complainant company; that he represented by written authority eight other stockholders who owned 555 shares in the complainant; that since February, 1913, the defendant company had not been engaged in the conduct of any

business "except the collection of certain outstanding notes;" that large amounts of money had been expended by the officers of the defendant in salaries of the officers, and traveling and expenses and the officers of the defendant have been withdrawing from the treasury of the company for alleged services and have paid out large sums as attorney's fees, which expenditures occasioned great loss to the stockholders of the defendants. It was charged that at a stockholders' meeting of the complainant a majority of over two-thirds of the issued stock of the complainant had agreed, and the officers of the complainant had pledged themselves to effect a dissolution of the defendants immediately, but that since such time the officers of the defendants have wasted the company's assets and grossly mismanaged the affairs of the company "to a large extent" and have failed to take steps toward a dissolution before the institution of the present action, and that about Sept. 15, 1913, various stockholders of the complainant filed a petition with the Arizona Corporation Commission praying such Commission to take steps to prevent the further carrying on of business of the defendant and such other steps as would be beneficial to the petitioners, and that the purpose of filing such petition was to secure the aid of the Commission in causing the dissolution of the company and to prevent further dissipation of the funds. A copy of the petition was attached to the petition in intervention. It was finally alleged that no dissolution proceedings had been instituted until begun in this action "when for the pur-

pose of carrying out a plan and scheme for further dissipating and expending the resources of the defendant the bill in equity herein was filed” The prayer was that the interveners be allowed to intervene and “be joined as defendants in this action and request that they may be permitted to join in the prayer of the petition to the extent that a receiver be appointed”
 * * * etc.

The petition addressed to the Corporation Commission, a copy of which was attached to the petition of intervener (R. 2477, p. 22) complained that payments had been made by the Bankers' Fire Insurance Company for attorney's fees, salaries and traveling expenses aggregating \$1,731.69. That in June the company only had a surplus of \$10,150, as against insurance of over one million dollars; that although the company is not doing any business it never had the policies re-written “and that should there be any material fire losses in the near future not only will the surplus which is being held by the said officers aforesaid (meaning the officers of the defendants) be eaten up, but the Merchants & Insurers' Reporting Company and eventually the stockholders, your petitioners, be forced to pay large amounts out of their pockets to cover said losses.”

The petition contains many other allegations, none of which, however, in any way impugn the conduct of the complainant company or its officers.

Perhaps the most extraordinary feature of the petition is that it is addressed to the Arizona Corporation Commission, of which the Intervener Jones was and is a member and yet it is signed by this same person as a petitioner (R. 2477, p. 27). Thus it appears the petitioner was addressing the petition to himself. It is not surprising that the prayer of the petition was heard and granted.

In opposition to the amended petition in intervention the complainant filed the affidavit of every person Jones alleged he represented in his unverified petition in intervention, repudiating Jones and withdrawing any prior authority in Jones to represent them (R. 2477, p. 33, 34).

This was filed January 10, 1914 (R. 2477, p. 34) and apparently the cause remained at rest until March 17, 1914, when it was announced that the cause was set for argument on April 7, which was subsequently changed to April 8 (R. 2477, p. 35).

On April 8, 1914, counsel appeared before the court (R. 2477, p. 37).

The demurrer to the petition of intervention was argued and overruled and the interveners were allowed to intervene.

The court then authorized the interveners to file affidavits "in support of their application for a receiver"

and the plaintiff and defendant were afforded the privilege of replying.

In other words, the intervener was told by the court to make a record to support the appointment of a receiver (R. 2477, p. 37), the future appointment of which had already been announced by the court. The demurrer which was interposed on April 8, 1914, and overruled, appears at p. 30, 40 R. 2477.

On April 13, Jones filed a new petition in intervention substantially similar to the previous petitions, in which, however, he assumed to represent sixteen California stockholders whose stock holdings were alleged to aggregate 200 shares instead of those whom he previously assumed to represent. This petition was supported by the affidavit of P. A. Parker, filed April 13, 1914, which contained much wholly irrelevant matter (R. 2477, p. 53-59) and to which she attached the contract of reinsurance which the defendant companies made on October 21, 1913, with the Fireman's Fund Insurance Company (R. 2477, p. 60-63) and the order of the Corporation Commission dated October 24, 1913 (R. 2477, p. 64-65), to which the Commission sought to give a retroactive effect by referring to the status of the companies' property as of October 21.

This showing was opposed by both complainant and defendant by the joint affidavit of John Castera, G. W. Boynton, H. F. Stanley, W. A. Johnston and Marshall Stimson (R. 2477, p. 66).

These gentlemen, who constituted the board of directors of the complainant company (R. 2477, p. 67), deposed that the complainant company owned all of the stock of the Bankers' Fire Insurance Company except three shares held by the directors thereof, that they unanimously passed a motion directing the directors of the Bankers' Fire Insurance Company to settle all the liabilities of that company and to turn over its assets and to dissolve the company; that these instructions were communicated to the directors of the defendant company, who, pursuant thereto, paid and cancelled all of the debts and liabilities of the company; that a stockholders' meeting of the defendant company was held thereafter and every share of stock of said defendant company was duly represented and it was unanimously resolved to dissolve the defendant company. The affidavit further averred that the affiants as directors of the complainant company were ready to receive in kind the assets of the defendant company; that the defendant company had then no debts or liabilities and that the assets thereof consisted of notes, mortgages and bonds largely covering property in California. Further, that complainant desires these properties turned over to it in kind without the delay and expense incident to reducing the same to cash. That no expense has been incurred by the defendant company beyond the necessary legal expenses since October 1, 1913, and that dissolution is desired without the delay and expense of a receiver being appointed therefor.

The joint answer of complainant and defendant was also filed to this new petition of Jones (R. 2477, p. 69). The answer demurred to the petition of Jones particularly because it failed to show that Jones or any of those he assumed to represent had any interest in the subject of the litigation and failed to disclose any right to intervene, and because it affirmatively appeared from the petition itself that neither Jones nor any of his associates were proper or necessary parties, but that they were unnecessary and improper parties and also pointed out the failure to comply with Rule 27 of the Equity Rules. It put in issue the allegations of fact in the petition and charged Jones with bad faith in that he intervened solely for the purpose of securing the appointment of a receiver at great expense to the plaintiff and defendant and for no useful or lawful purpose whatsoever. This joint answer was verified at length both by the president of the complainant and the president of the defendant (R. 2477, p. 74).

On April 25, the demurrer was overruled (R. 2477, p. 73) and nothing further was done until on July 1, 1914, the court appointed a receiver (R. 2477, p. 76).

The order recites the coming on of the "cause" to be heard upon the petition of Jones and others in intervention and upon the demurrer "and upon the motion of defendant to dismiss said petition for intervention and the answer thereto and after hearing evidence, both oral and documentary, in support of the said petition for in-

tervention and against the same, and fully considering the same, it was by the court ordered that the said petition for intervention should be allowed and the prayer thereof should be granted." This recitation is merely that evidence apart from that disclosed in the record was taken in support of the application to intervene. It appears of record, however, that only the affidavits, petitions and answers were used in support of and in opposition to the motion for a receiver. The order continues and recites that it is necessary to appoint a receiver and appoints Mr. Cassidy as such upon his giving a bond of \$3,000, "with full power and authority to do any and all the acts necessary in the premises for the full and complete performance of this order and subject to the further orders and rules of this court in the premises." We have never seen an order appointing a receiver confer such sweeping, and at the same time, such vague powers upon the receiver. What he is to do is not apparent. What is necessary "in the premises for the full and complete performance of this order?" It is to review and to reverse this order that this appeal is taken.

The assignments relied upon are the following:

III. "The Court erred in appointing a receiver of the Bankers' Fire Insurance Company, the defendant herein, by order entered July 1st, 1914, upon the application of

F. A. Jones for himself and in alleged behalf of all others similarly situated stockholders of said Merchants & Insurers' Reporting Company, the complainant herein, in each and all of the following particulars:

First: Because the complainant's bill in equity herein was duly filed and served on the 25th day of October, 1913, praying for a dissolution of the defendant and the appointment of its existing directors as its trustees for the purpose of dissolving and winding up the defendant, and that on the same day defendant's answer was duly filed and served herein admitting the truth of each and every allegation contained in the complaint herein and joining in the prayer of the complaint for a dissolution of the defendant, and that thereafter, on November 12, 1913, and prior to the filing of the petition of said F. A. Jones for leave to intervene, a hearing was had herein before the Hon. Wm. H. Sawtelle, Judge of the United States District Court, and that at said hearing after the allegations of the complaint had been proved by competent evidence the defendant by its counsel joined in the prayer for dissolution and the directors of the defendant company offered to the court to serve as trustees of the properties of the defendant for the purpose of the dissolution of the defendant and the winding up of its affairs in accordance with the directions of the court and upon such bond as the court might require without compensation, and that therefore there was no right or cause for the appointment of a receiver of the defendant.

Second: Because the petition in intervention herein and the affidavit of P. A. Parker filed in support thereof, upon which the application for the appointment of a receiver of the defendant herein was made, contain no allegation that the defendant is insolvent or tending to show that defendant is insolvent, or that the officers or directors or those in control of the defendant company have been or are guilty of fraud or breach of duty in managing and controlling the defendant's affairs.

Third: Because it is set forth in the bill or in the affidavit of John Auster, F. W. Boynton, H. Y. Stanley, W. A. Johnston, and Marshall Stimson, directors of the complainant filed herein in opposition to the application for a receiver of the defendant on April 20, 1914, and proved upon the hearing herein and not denied that the defendant is without debts or liabilities, that the complainant is the owner of all the capital stock of the defendant, and that the Board of Directors of the complainant are desirous of dissolving the defendant without the delay and expense of a receivership.

Fourth: Because neither the intervenor nor the other persons mentioned in the petition in intervention herein who alone seek a receivership for the defendant herein have any interest in the subject matter of this litigation."

We will discuss the errors assigned as follows:

POINT I.

The order is erroneous and constitutes an abuse of judicial discretion.

The record discloses no grounds whatever for the appointment of a receiver.

The defendant company was not insolvent.

Its assets and properties were not in jeopardy and no necessity for conservation or preservation—pendente lite was shown and no such necessity existed.

Indeed the cause was not pendente lite.

It had been tried and the parties were awaiting the announcement of the basis on which a final decree could be entered which should have directed the delivery of all the property of the defendant to the complainant as its equitable owner.

The application was made by a total stranger to the transaction after a trial and while the parties were awaiting a final decree.

It appeared that the defendant company was entirely solvent and that it had assets consisting of notes and mortgages, most of which affected California debtors and property.

It appeared that the company owed no debts.

It had re-insured in a well-known and thoroughly reliable company all of its outstanding insurance, which the appellee himself described in substance as precarious

and as an imminent danger to the complainant company and its stockholders.

Every share of its stock except three directors' shares was owned by the complainant.

The complainant was therefore the equitable owner of the defendant's assets.

The defendant company desired to assign to the complainant all its assets but without any authority whatever to do so the Corporation Commission, of which this same Jones was a member on October 24, 1913, assumed to restrain all disposition of the company's property (R. 2477, p. 64).

The absolute illegality of this action on the part of the Commission appears from an inspection of the Insurance Code of Arizona. Civil Code of Arizona, 1913, par. 3377 et seq. The fact that Jones deliberately exercised his functions of a quasi judicial character while a member of that Commission with reference to these very companies in which he had a pecuniary interest appears from the facts alleged and admitted in the Supreme Court of the State in *State ex rel Bullard vs. Jones*, 137 Pac. 544.

The complainant desired to take over the assets which belonged to it in kind, but the court below intervened by its order appointing a receiver and prevented this simple, expeditious and economical method of transferring the assets of the defendant to the complainant.

Instead of the litigants being permitted to deal with

their own property in this way, as they had a clear and unquestionable right to do, a receiver was appointed with no useful function to perform. While the recitative part of the order is voluminous, the ordering part is nothing but the most general language, far too vague to authorize any specific act or impose any definite duty. All the receiver can do is to reduce the assets of the defendant to cash at great expense to the complainant, the equitable owner of the assets, and when he receives the cash, after deducting his own fees and those of his counsel, he must pay the surplus to the plaintiff. But his collection of the defendant's assets would entail expensive ancillary proceedings in the Southern District of California, and when at great expense he has extended the receivership to California and collected the assets they would be returned into the court of original jurisdiction only to have the remnant thereof delivered to the complainant, to be again taken to California, where the complainant resides. All of which could lawfully have been accomplished by the simple act of the parties—which act was delayed during the great length of time the court took in holding the matter under advisement, although no controverted issue of law or fact was to be determined, from the date of trial, Nov. 12, 1913, until July 1, 1914, when judicial action finally culminated, not in the final decree to which the parties were entitled, but in an interlocutory order after trial appointing a useless receiver.

This we submit was a plain misadministration of justice. With great respect we submit it made a costly travesty of a serious judicial proceeding.

No possible benefit can result to the litigants from such a course. The receiver and his counsel are the only ones who can possibly benefit thereby. Even the intervenor Jones derives no benefit therefrom, but in reality sustains loss. But his interest as a stockholder of the complainant is so insignificant that it is utterly immaterial to him how much this receivership may cost the complainant.

He owns stock of the par value of \$500, or one-seventh of one per cent of the outstanding capital of complainant (R. 2477, pp. 16, 41, 53). He has 50 shares of \$10 each out of a total of 35,000 shares. If every dollar of the expenditure of which he complains had been entirely wasted the total loss was \$1731.69. Of this, Jones lost, taking his own figures, \$2.47. There is, of course, no way of knowing what loss will be entailed upon complainant through the expenses incident to this receivership. Based, however, upon assets in excess of \$200,000 it may fairly be assumed that it will run up to thrice \$1731.69. In this event Jones will lose as much as six or seven dollars more. We do not calculate the grand totals for the other intervenors alleged to be represented by Jones, as no opportunity was ever afforded to appellants to test the truth of his claim to represent them. But if all of them are really repre-

sented their share of the losses complained of does not exceed about \$10.00.

And at whose instance was this receiver appointed? Nominally at the instance of the intervenor Jones; actually the appointment was *sua sponte*.

We say this because we respectfully contend that the intervenor Jones was not a party to the proceedings, notwithstanding the court's order allowing him to intervene. He was nevertheless a total stranger to the matters before the court and it was a plain abuse of discretion to permit him to interfere in the litigation and on his nominal motion to appoint a receiver under the circumstances disclosed.

Jones asserted no equity which entitled him to intervene. He possessed none. He made no charge of any character against the officers of the complainant company, in which he was an insignificantly small stockholder. His whole attack was against the officers of the defendant company. His prejudices in this respect are reasonably inferable from the case of *State ex rel Bullard vs. Jones*, 137 Pac. 544. He did not pretend that he had ever made any demand upon the directors of the complainant to do anything he wanted done. Indeed his various petitions in intervention and his petitions addressed to himself as a member of the Corporation Commission are replete with absurd inconsistencies constituting the pretended grievances of these insurgent and mischievous stockholders. His sole claim to the right

to intervene is that he is a stockholder not in the defendant companies but in the complainant.

What more can he receive after he intervenes than he will receive as a stockholder of the complainant without intervention? His prayer was that he and his 16 California associates be joined as parties defendant.

That the granting of his prayer would destroy the diversity of citizenship requisite to support the court's jurisdiction was apparently of no consequence.

It might just as well be announced that whenever a corporation brings suit any stockholder therein may intrude himself into the litigation merely by moving to intervene therein.

Such is the effect of the learned court's ruling permitting intervention. With great respect for the learned court below, we submit that the granting of permission to Jones to intervene in the cause upon the showing made was a plain and clear abuse of judicial discretion. So plain do we regard it that we think it clear that it constituted no support for the motion for the receiver and while as we have said the motion was nominally by the intervenor, we think the appointment can only be justified provided it is such an extreme case as to support the appointment by the court *sua sponte*.

Is it such a case?

We have sought in vain for any possible justification of the order complained of. We have found none.

We do not think this court can countenance and place the stamp of its approval upon the appointment of a receiver in this case. The necessity for a costly receivership, if it exists, to bring about a simple transfer of assets from one party to another is a reflection upon the efficiency of our jurisprudence.

It is not disputed that the plaintiff owns every share of stock but three in the defendant company. It is admitted by the record that the defendant company is solvent; that it has no debts and that all its insurance obligations are re-insured.

Both complainant and defendant desire the defendant to deliver its assets in kind to the complainant, its equitable owner.

Both earnestly protest against the imposition of an enforced guardianship over them and their property by the appointment of a receiver who has nothing whatever to do except to effect a transfer of assets from the defendant to the complainant and to charge the complainant with the receiver's fees and those of his counsel.

And this is sustained upon the motion of a small stockholder of the complainant company having no possible relation to the case.

In reality a total stranger to the record, although authorized by the court to intervene therein—one who makes no claim of any kind against the complainant, one whose charges against the directors of the defendant, if true, show that the complainant and not the in-

tervenor is the proper party to redress the wrongs alleged.

No grounds existed for the appointment of a receiver. The order appointing a receiver is a plain abuse of judicial discretion.

We would not have this court suppose that we entertained anything but the highest regard for the learned court below or for the particular receiver who was appointed in these cases. But we submit that when litigants are required to pay tribute to the court's officers for the privilege of lawfully transferring from the defendant, property which indisputably belongs to the plaintiff, our protest is justified. As officers of the court below and as counsel for the parties injuriously affected, it is not only our duty but our privilege to protest against the order appealed from.

We do protest against it and ask that the order be reversed with costs.

Respectfully submitted,

MARSHALL STIMSON,
Los Angeles, California.

F. C. STRUCKMEYER,
JOS. A. JENCKES,
Phoenix, Arizona
Solicitors for Complainant.

RICHARD E. SLOAN,
WILLIAM M. SEABURY,
JAMES WESTERVELT,
Phoenix, Arizona.
Solicitors for Defendants.

San Francisco, October 16, 1914.

United States
Circuit Court of Appeals
For the Ninth Circuit

MERCHANTS & INSURERS' REPORTING COMPANY, a Corporation, and BANKERS FIRE INSURANCE COMPANY, a Corporation,

Appellants,

vs.

No. 2477

F. A. JONES, Intervenor, and LY-SANDER CASSIDY, as Receiver of the BANKERS FIRE INSURANCE COMPANY, a Corporation, Appellees.

MERCHANTS & INSURERS' REPORTING COMPANY, a Corporation, and PHOENIX FIRE UNDERWRITERS, a Corporation, Appellants,

vs.

No. 2476

F. A. JONES, Intervenor, and LY-SANDER CASSIDY, as Receiver of the PHOENIX FIRE UNDERWRITERS, a Corporation, Appellees.

Filed

OCT 16 1914

Appellees' Brief. D. Monckton,
clerk.

STONEMAN AND LING,
Phoenix, Arizona

HENRY W. NISBET,
Los Angeles, Cal.
Solicitors for Appellees

*United States Circuit Court of Appeals for the
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SANDER CASSIDY, as Receiver
of the PHOENIX FIRE UNDER-
WRITERS, a Corporation,
Appellees.

APPELLEES' BRIEF.

Appellants on this appeal complain of an order made by Hon. Wm. H. Sawtelle, Judge of the U. S. District Court of the District of Arizona, appointing a receiver for the Bankers Fire Insurance Company,

a Corporation, and the Phoenix Fire Underwriters, a Corporation, their contention being that the court committed error in allowing petitioner Jones on behalf of himself and certain other stockholders in the Merchants and Insurers Reporting Company, a Corporation, one of appellants herein, to file a petition in intervention whereby it was asked to have a receiver appointed instead of the person, or persons sought to have appointed by the said Merchants and Insurers Reporting Company with the consent of the Bankers Fire Insurance Company and the Phoenix Fire Underwriters. And without that intervention the court was powerless to appoint a receiver.

FACTS.

The facts are not disputed; that the Merchants and Insurers Reporting Company, a Corporation organized under the laws of the State of California, on the 25th of October, 1913, filed in the United States District Court of the District of Arizona, a petition whereby they sought to have Leroy H. Civile, H. A. Davis and C. S. Feldman, who were then the directors, and only directors, of both of said Bankers' Fire Insurance Company and the said Phoenix Underwriters, appointed as trustees of the properties of the defendant pending a dissolution and winding up

of the affairs of said corporations (R. 2477, p. 9). That the Bankers' Fire Insurance Company and the Phoenix Fire Underwriters in each of said actions upon the same day appeared by their attorneys, admitted the truth of each and every allegation contained in complainants' petition and joined in the prayer thereof. (R. 2477, p. 12). Thereafter on November 12, 1913, certain proceedings were had whereby the complainants introduced in evidence certain exhibits in support of its petition, and thereupon the defendant in each of said cases joined in the prayer for dissolution. The court was apparently not satisfied of the good faith in the matter and took the same under advisement (R. 2476, p. 1). Thereafter, upon petition theretofore filed therefor, on April 8, 1914, the court made its order granting F. A. Jones and other stockholders he represented to file a petition in intervention. (R. 2477, p. 36). The said petition being thereafter on the 13th day of April, 1914, with the affidavit of P. A. Parker in support thereof filed (R. 2477, p. 41-65).

ARGUMENT.

First: With reference to the intervention of F. A. Jones and other stockholders the appellants seem to take the position that because they are not the owners

of any stock of the Bankers' Fire Insurance Company or the Phoenix Fire Underwriters that they have no right to intervene, notwithstanding the fact that the Merchants and Insurers Reporting Company in which they are the holders of stock is the owner of all of the stock of both the Bankers' Fire Insurance Company and the Phoenix Fire Underwriters. We think that the intervenor Jones, and those he represents, have a sufficiently direct and immediate interest in the assets of those two corporations to allow them to intervene to safe-guard and protect the interests of those two corporations, which in effect is the interest of the stockholders of the Merchants and Insurers Reporting Company.

Second: Appellees contend, that irrespective of the right of F. A. Jones or any other stockholders of the Merchants and Insurers Reporting Company to intervene, the Judge of the District Court was not bound to follow the wishes of the appellants in appointing those persons whom *they* desired to act as trustees in winding up the affairs of the two Arizona corporations. The feverish haste and the manner in which the appellants proceeded in the District Court, undoubtedly aroused the suspicions of the Judge of that court and he took time to consider the matter, and before he came to any determination as to his action therein intervenor Jones asked leave

to file his complaint of intervention, which was thereafter allowed and which resulted in matters and facts being brought to the knowledge of the court which resulted in, and we think justly so, of the appointment of some one other than the directors of the Bankers' Fire Insurance Company and the Phoenix Fire Underwriters as receiver. The appellants in effect conceded that a receiver should be appointed, but they designated such receiver trustee and desired to foist their own selection on the court.

Why was it that the stockholders who first gave intervenor Jones written authority to join them in a petition for intervention revoked such authority? (R. 2477, p. 33-34). Undoubtedly some pressure must have been brought to bear on them to revoke that authority and such pressure must have been brought by those officials who wished to perpetuate their control of said corporation indefinitely, notwithstanding the fact that at the annual stockholders meeting of the Merchants and Insurers Reporting Company held in the month of July, 1913, directors were elected who pledged themselves to cause a dissolution of the Bankers' Fire Insurance Company. Leroy H. Civile and H. A. Davis two out of three directors of said corporation being present and acquiescing thereto (R. 2477, p. 49-50). It appears from the affidavit of P. A. Par-

ker, (uncontradicted) that a firm of attorneys in the City of Los Angeles, after the month of July, 1913, when a new Board of Directors was elected at the annual stockholders meeting of the Merchants and Insurers Reporting Company, became the attorneys for all three appellant corporations notwithstanding the fact that one of the members of said firm had for about two years prior thereto continuously kept up an attack against the integrity and honor of all three appellant corporations; that he wrote scurrilous articles concerning the appellant corporations, referring to them as fake corporations and fraudulent corporations. The said attorneys ever since their selection as said attorneys directing the affairs of appellant corporations (R. 2477, p. 55 and p. 58).

The petition in intervention charges the officers of appellant Bankers Fire Insurance Company, cause No. 2477, as likewise the officers of appellant Phoenix Fire Underwriters in cause No. 2476, with having wasted the assets of said companies, and of grossly mismanaging the affairs of both of said appellants' (R. 2477, p. 44). And this is supported by the petition of certain stockholders to the Corporation Commission of Arizona, attached to intervenor's petition and made a part thereof (R. 2477, p. 48). As also by the affidavit of P. A. Parker on behalf of intervenor filed with said petition (R. 2477, p. 57).

It appears from the record that the Arizona Corporation Commission had taken steps to itself take charge and control of the appellant Bankers Fire Insurance Company and the appellant Phoenix Fire Underwriters, and that the Arizona Corporation Commission caused to be served upon each of said corporations an order relating to their affairs (R. 2477, p. 64). This was probably an additional reason for the appellant corporations attempting to procure the District Court of Arizona to appoint the three officials named as trustees, to wit: to hold off the taking charge of the two appellant Arizona corporations by said Commission.

If the appellant corporations were really solicitous of winding up the affairs of the two Arizona corporations speedily and at the minimum of expense, why did they not proceed to do this under the provisions of the laws of the State of Arizona?

Sec. 2107 of the Civil Procedure of that State provides for the dissolution of corporations in the precise case in which each of these appellant Arizona corporations found themselves: "Whenever a corporation heretofore, or hereafter organized or incorporated under the laws of this state shall either (4) or whenever at any general or special meeting of the stockholders of any such corporation, the holders of the majority of its outstanding

stock, represented or voting at any such meeting, shall have directed the disposal of all corporate assets, or that the corporation be dissolved, or that it ceases to use or exercise its corporate franchise, either the Attorney General of the State or any resident thereof or any *stockholder or officer of any such corporation* may bring, prosecute and maintain (either in the name of the Attorney General or in his own name) an action in any court of record in this State, to have and procure a judicial dissolution and disincorporation of all rights, privileges and franchises”—
 Sec. 2107, Civil Procedure Arizona.

At a special meeting of the stockholders of the Bankers Fire Insurance Company held on the 24th day of October, 1913, there being 1999 shares represented out of a total of 2000, it was unanimously resolved “that the directors be directed to dissolve, or secure the dissolution of these corporations in the most expeditious and economical manner possible” (R. 2476, p. 11-13).

Upon the same day a meeting of the Board of Directors of said corporation was held, and it was then resolved, in pursuance of the action of said stockholders meeting, that said corporation be dissolved and cease to use or exercise any of its corporate franchises (R. 2476, p. 8-9).

Similar action was taken by the Phoenix Fire Underwriters stockholders at a meeting held on the same day (R. 2476, p. 15-17). And by directors' meeting held on same day (R. 2476, p. 18-19).

It would have been a very simple and comparatively inexpensive way to have dissolved these two Arizona corporations by going into the Arizona State courts; but it is patent that the officers of appellant corporations, for reasons of their own, did not want a speedy dissolution of the two Arizona corporations, and endeavored to perpetuate for some indefinite period their control and management of these two Arizona corporations by procuring the directors of the two Arizona corporations to be named as *trustees*, with the aid of the Federal Court.

It was not necessary for them to go into the Federal Court to bring about a dissolution of these two corporations, and none knew it better than themselves; but, having rushed into the Federal Court, and having there failed to perpetuate their control and management of these two Arizona corporations, they are loud in their lamentations over the appointment by the court of a receiver not named by themselves.

We believe that under all of the facts in the case the court was amply justified in appointing a receiver, and one in no wise connected with appellant corpora-

tions, and that no error was committed by the court in so doing.

San Francisco, October 16, 1914.

STONEMAN AND LING,
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